IN THE

Supreme Court of the United States

No. 78-1642

ST. REGIS PAPER COMPANY, ~~A Corporation~~
Petitioner

v.

RAY MARSHALL, Secretary of Labor, *et al.*
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

I

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 18 FEP 1635 (10th Cir. 1979). The District Court opinion is reported at 14 FEP 1641 (Col. 1977). Copies of these opinions are attached as Appendices A and B.

II

JURISDICTION

The Judgment of the Court of Appeals was entered on January 31, 1979. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III

QUESTION PRESENTED

Whether under the Fifth Amendment and Executive Order 11246 the Court below was correct in holding that St. Regis, a government contractor, was required to exhaust lengthy and futile administrative procedures before resorting to the courts to determine the legality of the Department of Labor's regulations which mandate:

a. De facto debarment from two contracts without a prior hearing; and,

b. Exaction of retrospective remedies of back pay and seniority for members of an "affected class".

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person . . . shall be deprived of life, liberty or property, without due process of law.

V

REGULATORY PROVISIONS INVOLVED

1. Executive Order 11246 is attached as Appendix C.

2. 41 C.F.R. § 60-1.26(a)(2), 41 C.F.R. § 60-2.1 and 41 C.F.R. § 60-2.2 are attached as Appendix D.

VI

STATEMENT OF THE CASE

St. Regis Paper Company is a major producer of lumber, lumber products, paper and related products in more than 100 facilities located throughout the nation. St. Regis has a substantial number of government contracts and subcontracts. As a primary and subcontractor, St. Regis is covered by Executive Order 11246, which requires government contractors to effectuate non-discrimination in employment.

In February 1976, General Services Administration, the designated compliance agency, conducted a compliance review at a Company lumbermill in Libby, Montana, and concluded that St. Regis had not met established goals for the employment of women. GSA accordingly issued a "show cause notice," giving St. Regis 30 days to correct the alleged deficiencies or face debarment. The notice stated in part:

> You are hereby advised that St. Regis Paper Company can be found non-responsible to perform any government work until this show cause notice is finally and favorably resolved.

This notice meant that St. Regis would not be eligible to receive any government contract or subcontract until St. Regis had satisfied GSA that the alleged "deficiencies" had been corrected. In fact, the OFCCP regulations specifically provide for *de facto* debarment without a prior hearing. 41 C.F.R. § 60-2.2(b). 41 C.F.R. § 60-1.26(a)(2) and 60-2.1(b) provide for retrospective make-whole remedies—including back pay and retroactive seniority for an alleged "affected class".

OFCCP promised St. Regis that a hearing on the "substantial issues of law and fact" would be held. These issues would include the validity of *de facto* debarment and retrospective remedies. Under the then-existing regulations, OFCCP was obligated to provide a separate hearing on these "substantial issues," before proceeding to enforcement. Notwithstanding that obligation and without any such hearing, the Department of Labor issued a Complaint instituting enforcement proceedings.

In the course of these enforcement proceedings, St. Regis was formally advised by the Administrative Law Judge assigned to the case that the issue of *de facto* debarment was not before him. He waffled on the issue of retrospective make-whole remedies but eventually concluded that the *factual,* but not the legal, issue was before him. He made it clear that he would not and could not, however, assert any authority to set aside any agency regulations. As an appointee of the agency, he could not question the validity of the regulations.

In short, the record shows that the two crucial issues which St. Regis seeks to have decided by the courts will never be decided in the administrative proceeding. Resorting to these administrative procedures is therefore a useless charade. These are legal issues going to government authority and they are ripe for judicial review.

Faced with debarment and a fruitless administrative proceeding, St. Regis filed a complaint in the United States District Court for the District of Colorado against the Secretary of Labor and others, seeking declaratory judgment and injunctive relief.

St. Regis alleged that certain regulations promulgated by the OFCCP were arbitrary and capricious, contrary to due process, and in excess of the authority granted by Executive Order 11246. Specifically, the complaint contended that the regulations which mandated the following procedures were unlawful: (1) debarment without a hearing; and (2) retrospective relief for an "affected class". The complaint sought both a judgment that these regulations were unlawful and unenforceable and appropriate injunctive relief restraining the Government from further enforcement of said regulations.

The district court and the United States Court of Appeals for the Tenth Circuit refused to reach the merits.

To put this case in proper focus, a few additional facts may be useful.

We have referred to a March 22, 1976, show cause notice issued by GSA to St. Regis. This notice alleged "underutilization" of females. On June 2, 1976, St. Regis, faced with the threat of loss of government contracts, entered into a "conciliation" agreement with GSA resolving the issue of underutilization of females to GSA's satisfaction without any admission of liability. App. E. Before this conciliation agreement was entered into, the GSA had issued a second show cause notice seeking "retroactive awards of pay and service credits" for the same alleged "affected class". App. F. An addendum to the conciliation agreement specifically states that it resolves all issues except the issues of retroactive seniority and back pay to the alleged "affected class" of females.

This was the *only* issue left unresolved by the conciliation agreement of June 2, 1976.

VII

REASONS FOR GRANTING THE WRIT

A

The Decision Below Raises Significant and Recurring Problems Involving the Rights and Responsibilities of All Government Contractors Under Executive Order 11246.

The scope of Executive Order 11246 is all-encompassing. All Federal contractors and subcontractors are bound by its terms for *all* their operations and not for just operations which have government contracts. A high-ranking official of OFCCP has estimated that approximately 250,000 contractors employing 35 million persons are covered by the Order.

The threshold issue before the Court is whether St. Regis must first exhaust its administrative remedies. However, the determination of that issue will turn in large part on the nature and importance of the underlying issues presented, and an evaluation of the extent to which an administrative proceeding is necessary and productive as opposed to a direct judicial resolution of the underlying issues.

These two underlying issues are: (1) whether the OFCCP can constitutionally and under the Executive Order debar a contractor without any prior hearing, and (2) whether OFCCP has the authority to exact retrospective remedies of backpay and seniority.

St. Regis and government contractors generally are constantly subjected to threats of debarment and contract termination should they refuse to provide such retrospective remedies, and are still being threatened with debarment without prior hearing.

St. Regis respectfully contends that the courts below were in error in refusing to decide these fundamental and recurring issues as to the rights and responsibilities of government contractors. Instead, the courts below held that the Company must first exhaust its administrative remedies. St. Regis further contends that it has no administrative remedies.

Contrary to the opinions below, the agency regulations and operations at issue here constitute "final agency action". They present purely legal issues which can only be decided by the courts.

The on-going administrative proceeding is illusory because its result is foreordained. It will not address the urgent legal issues which only the courts have the authority to resolve, and upon which the validity of the administrative proceedings depend. The illusory nature of the administrative procedure is illustrated by the fact that in a pre-hearing conference held on October 20, 1978, the Administrative Law Judge ruled that the regulations allowing the government to "passover" or declare a contractor ineligible for Federal contracts without a hearing were not even at issue in the administrative proceeding.

Furthermore, as to the authority of the OFCCP to exact back pay and other retrospective remedies, the position of the Government is clear. Since the inception of this lawsuit, 41 C.F.R. § 60-2.1(b) has been revised to specifically provide for backpay relief as a remedy for violation of the Executive Order. These OFCCP regulations constitute final agency action. They are issued under the authority of the Secretary of Labor—the same official who would hear the appeal from an adverse decision of an Administrative Law Judge, and they are binding on the Law Judge.

The regulations of the Department of Labor (OFCCP) not only represent an unconstitutional extension of executive power, but are also in clear contravention of the Executive Order itself.

B

The Debarment of a Contractor Without a Prior Hearing Violates the Executive Order and Denies It Due Process of Law.

The Government routinely issues show cause notices debarring government contractors without a prior hearing. The purported authority for such a practice is an OFCCP regulation, 41 C.F.R. § 60-2.2(b) (attached as Appendix D). It provides for a finding of "non-responsibility" and debarment from government contracts without a prior hearing. The *only* guarantee which a contractor is given under the regulations is that it will not be "passed over" *more than twice* without receiving a hearing. The Executive Order forbids debarment without prior hearing. Section 208(b) states in pertinent part:

> No order for debarment of any contractor from further Government contracts under Section 209 (a)(6) shall be made without affording the contractor an opportunity for a hearing.

Further, the practice denies contractors constitutional due process.

The Government has argued in this and other cases that a permanent "debarment" is distinguishable from a "passover" for two contracts. This is a ludicrous argument. It has been rejected by virtually all of the lower courts which have ruled on this issue. In *Pan American World Airways* v. *Marshall,* 439 F. Supp.

487 (S.D.N.Y. 1977), the court ruled that the "non-responsibility" finding itself constituted "debarment":

> I have looked to the only definition of "debarment" in the Order—the functional one contained in Sections 208(b) and 209(a)(6)—and find that a "debarment" occurs when an agency is ordered to refrain from entering into future contracts with a contractor. *No minimum number of affected contracts is required.* The denial of the MAC contract to Pan American without provision of the opportunity for hearing required by the Order constitutes an action by the agency "without observance of procedures required by" the Order. [439 F. Supp. at 496; emphasis supplied.]

Accord: Sundstrand Corp. v. *Marshall,* —— F. Supp. ——, 17 FEP 432 (N.D. Ill. 1978); *Illinois Tool Works* v. *Marshall,* —— F. Supp. ——, 17 FEP 520 (N.D. Ill. 1978); *Conrac Corp.* v. *United States,* No. 773153-HP (C.D. Cal. Aug. 24, 1977); *International Harvester Co.* v. *Marshall,* No. IP 77-159-C (S.D. Ind. March 25, 1977); *Texaco, Inc.* v. *Marshall,* No. B-77-416-CA (E.D. Tex. August 23, 1977). See also *Myers & Myers, Inc.* v. *U.S. Postal Service,* 527 F.2d 1252, 1259 (D.C. Cir. 1975), where the court noted "[t]he fact that the Service did not label its actions as a debarment is inconsequential, for the Service cannot bypass these important procedural safeguards merely by omitting the formal label to the sanction applied."

The OFCCP's position that St. Regis is ineligible for a Government contract without guaranteeing it a right to a prior hearing raises not only a legal issue under the Executive Order but also a constitutional question under the due process clause of the Fifth Amendment. The right of due process under law is constitutionally mandated and neither subject to legislative or execu-

tive countermand. In a number of recent cases, the Court has carefully enunciated when the due process right comes into play:

> The applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. Governmental deprivation of such an interest must be accompanied by minimum procedural safeguards, including some form of notice and hearing. [*Arnett* v. *Kennedy,* 416 U.S. 134 at 164 (1974) (J. Powell, Blackmun, concurring).]

Due process protection can be read broadly so as to reach "any significant property interest". *Fuentes* v. *Shevin,* 407 U.S. 67, 87 (1972), citing *Boddie* v. *Connecticut,* 401 U.S. 371, 379 (1971). So long as the property deprivation is not *de minimis,* due process rights are constitutionally mandated. *Goss* v. *Lopez,* 419 U.S. 565, 575 (1975).

St. Regis has been and will continue to be subjected to a significant "deprivation" of a substantial property interest in maintaining and obtaining its government contracts as a result of the Government's finding of nonresponsibility.

This significant deprivation of a property interest is not cured by the OFCCP Regulations providing for a possible pre-"passover" hearing on substantial issues of law and fact. Those Regulations clearly reveal that opportunity for such a hearing is exclusively within the discretion of the contracting officer or the Director of OFCCP. 41 CFR Part 60-2.2(b). Although promised such a hearing, St. Regis has never given one.

It is well-settled that the right to a due process hearing may be waived by the affected party but not denied by the Government. *Boddie* v. *Connecticut, supra* at 378-379. St. Regis has not waived its right to a hearing before debarment. To debar it without such hearing deprives St. Regis of due process and violates the Executive Order.

C

The Demand for Backpay and Other Retrospective Relief Violates the Executive Order and Encroaches Upon The Jurisdiction Given by Congress to The E.E.O.C.

The entire basis for the on-going administrative proceeding is the demand for backpay and retrospective seniority for an alleged "affected class" of females.

There is absolutely no basis for such retrospective make-whole relief in the Executive Order.

The contractor's obligations under the Order with respect to employment are couched entirely in *prospective* terms, with emphasis on affirmative action programs. E.O. 11246, Part II, subpart B, § 202 (included in Appendix C).

Section 209 of the Executive Order is the only provision in the Executive Order prescribing explicit sanctions and penalties for violations of the Order. This Section does not mention backpay, seniority relief or any other type of retrospective remedy. Nowhere in the Executive Order, and more specifically, nowhere in Section 209, is there any "catchall" provision giving the Secretary general authority to seek any type of sanction beyond those sanctions specifically provided. Section 209 is a finite list of sanctions that the Secretary of Labor may employ. These are: (1) publication

of the names of violators; (2) recommending certain violations to the Department of Justice for enforcement; (3) recommending to the Equal Employment Opportunity Commission and Department of Justice that Title VII proceedings be instituted; (4) recommending to the Department of Justice that criminal proceedings be instituted; (5) cancellation, termination or suspension of existing contracts; and (6) debarment.

It is thus clear that the express terms of the Executive Order do not directly or indirectly empower the Secretary of Labor to seek backpay, seniority credit or any other type of retrospective relief for employment discrimination. Such authority is solely vested in the EEOC and the Department of Justice under Title VII of the Civil Rights Act of 1964. The Executive Order reenforces this exclusive jurisdiction by its express provision for referral of Title VII proceedings to the EEOC and the Department of Justice.

This separation of jurisdiction is further supported by *United States* v. *East Texas Motor Freight System,* 564 F.2d 179, 184 (5th Cir. 1977). In that case the Court concluded that "nothing in this Order [Executive Order 11246] suggests any authority to direct retroactive seniority benefits to third party discriminatees." Similarly, other courts have held that, unlike Title VII, there is no authority under the Executive Order for a private right of action. *Traylor* v. *Safeway Stores, Inc.,* 402 F. Supp. 871 (N.D. Cal. 1975); *Farmer* v. *Philadelphia Electric Co.,* 329 F.2d 3 (3rd Cir. 1964); *Farkas* v. *Texas Instruments, Inc.,* 375 F.2d 629 (5th Cir. 1967), *cert. denied* 389 U.S. 977 (1967). The courts in these cases held backpay and other private remedies were not available under the Executive Order.

To the extent that the Executive Order has been given any credence by the lower courts, such authority has been shakily premised on the powers granted to the President under the Federal procurement statute. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971), *cert. den.,* 404 U.S. 854 (1971). 40 U.S.C. § 486(a) states:

> The President may prescribe such policies and directives not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator and Executive agencies in carrying out their respective functions hereunder.

This is a weak reed upon which to hang the right to invoke sanctions against a government contractor for alleged discrimination and this rationale has been severely criticized by commentators.[1] Reservations as to the legislative base for the Executive Order have recently been expressed by this Court in the case of *Chrysler Corp.* v. *Brown,* —— U.S. ——, 47 U.S.L.W. 4434 (No. 77-922, April 18, 1979).[2] The Executive Order is certainly not an Act of Congress. Support for

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[1] See Morgan, "Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process", 1974 *Wis.L.Rev.* 301, 309-313 (1974); "Executive Order No. 11246: Presidential Power to Regulate Employment Discrimination", 43 *Mo.L.Rev.* 451, 477-482 (1978).

[2] In this decision, the Court showed serious concern about the validity and legislative support for the Executive Order and even more concern about the regulations which seek to draw upon the Executive Order for their legitimacy.

retrospective relief under the Order cannot be inferred from the generalized procurement statutes which make no reference to equal employment opportunity and certainly not to retrospective remedies. Further, the entire thrust of the Executive Order itself relates to future conduct and does not address itself to make-whole remedies.

The Government position on these retrospective remedies has been given little support by the lower courts. One case, *United States* v. *Duquesne Power and Light Company,* 423 F. Supp. 507 (W.D.Pa. 1976), has adopted the Government's position. That case has been severely criticized by commentators.[3] Other courts which have also reviewed the Order have drawn a clear distinction between authority for imposing prospective sanctions as opposed to retrospective relief. This Court itself, in *Chrysler,* stated, "[t]he origins for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and courts." In *Contractors Association,* the court stated:

> Plaintiffs are not being discriminated against. They are merely being invited to bid on a contract with terms imposed by the source of the funds. The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. *The Plan does not impose a punishment for past misconduct.* It exacts a covenant for present performance. [442 F.2d 159 at 176. (emphasis added).]

In *U.S.* v. *Lee Way Motor Freight, Inc.,* —— F. Supp. ——, 15 FEP 1385, 1395-1399 (W.D.Oklahoma 1977), the court adopted the Report of the Special Master with respect to his finding that individual retro-

[3] See *e.g.* "Presidential Power to Regulate Employment Discrimination", *supra* at 488-495.

spective relief was not available under the Executive Order. In specifically rejecting *Duquesne,* the decision in *Lee Way* recognized not only the prospective nature of the Executive Order but also the separate and distinct purposes of Title VII of the Civil Rights Act:

> I conclude that E.O. 10925 [predecessor to E.O. 11246] was not intended to provide for actions by the Government for breach of contract to recover back pay or retroactive seniority for individuals injured by the contractor's noncompliance with the E.O. Accordingly, the limits on individual relief are those provided by 42 U.S.C. 2000e-6 [Title VII]. [15 FEP 1385 at 1399.]

The distinction between the purposes and limitations of Title VII and the Executive Order are significant. By enacting Title VII, the *Congress* sought to establish a wide-ranging program to eradicate employment discrimination. The remedies for its violation are broad and with the exception of limitations expressly set forth in the statute itself, are all-encompassing. They include due process protections which do not appear in the OFCCP Regulations.

Under Title VII, upon a finding by the EEOC as to whether or not there is probable cause to believe an employer has violated its provisions, suit may be brought on a *de novo* basis in United States District Court on the issue of discrimination. The EEOC has no authority to enforce any sanctions or penalties against an employer unless the employer either voluntarily accedes to their imposition, or it is ordered to do so by a Federal court after the demands of due process in the Federal court system have been met. Under OFCCP regulations, the Department of Labor has given itself the authority to impose various penalties, including retrospective remedies and contract pass-

over, without opportunity for a prior due process hearing for the contractor alleged to be in violation. OFCCP regulations provide for such broad relief, notwithstanding the fact that the sanctions available under the Executive Order are severely limited. It was not the intent of the Executive Order to trespass upon the remedies available under Title VII. Title VII remedies do include the award of individual backpay and seniority credits. If the Executive Order mandated such relief it *would* be trespassing on ground specifically reserved by Congress to the EEOC. The Fifth Circuit in *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 222 (1977), *cert. granted,* —— U.S. ——, 47 U.S.L.W. 3401-02 (1978), recognized this distinction:

> We must judge the legality of Kaiser's training ratio in light of both Title VII with its "make-whole" objective, and Executive Order 11246, with its mandate for affirmative action that does not itself discriminate.

The legislative history of Title VII is consistent with the position taken here. The Senate defeated an amendment to merge OFCCP with the EEOC. Senator Saxbe succinctly described the distinction between the Executive Order and the authority vested in the EEOC under Title VII:

> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold in a limited and expensive case by case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required. [Legislative History of the Equal Employment Opportunity Act of 1972, p. 915.]

Since the OFCCP's regulations and policies seeking backpay and other retrospective relief exceed the scope of the Executive Order, they are unlawful. See *e.g., Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra* at 175; *EEOC* v. *American Telephone & Telegraph Company,* —— F. Supp. ——, 13 FEP 392, 415 (E.D.Pa. 1976); and *U.S.* v. *Lee Way Motor Freight, supra.* Strict scrutiny of the Order is necessary in view of its status as a creature of the Executive and as an asserted basis for promulgating OFCCP regulations. The Third Circuit has stated:

> While it is true that we have held that the regulations issued under Executive Order 11246 have the force and effect of law [citing *Contractors Association*] it is quite a different thing to say that the Executive Order and regulations are themselves statutes. This we cannot do. [*Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Company,* 506 F.2d 735 at 740 (3rd Cir. 1974).]

The Executive Branch cannot bootstrap its limited authority so as to extract retrospective remedies under the guise of agency regulations which themselves transgress the Executive Order. By such method the Government is violating the separation of powers principle that has served as the bulwark of our Constitutional system. See *Youngstown Sheet & Tube Company* v. *Sawyer,* 343 U.S. 579 (1952).

D

The Exhaustion Concept Was Misapplied to Defeat The Ends of Justice.

In determining whether jurisdiction lies for court review of an agency action, the courts must determine

whether the issue is ripe for judicial resolution, while at the same time assessing the correlative advantage of a preliminary administrative proceeding. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 149 (1967); *Toilet Goods Association* v. *Gardner* (*Toilet Goods I*), 387 U.S. 158, 162 (1967); *Gardner* v. *Toilet Goods Association* (*Toilet Goods II*), 387 U.S. 167, 170 (1967). In balancing these interests, it is to be emphasized that the doctrine of exhaustion of remedies is not a rule of constitutional construction but rather a rule of judicial convenience, developed to avoid premature intervention by the courts in administrative proceedings. It is a flexible rule, subject to numerous exceptions. *Abbott Laboratories* v. *Gardner, supra; McKart* v. *United States,* 395 U.S. 185, 193 (1969).

The threshold issue as decided by the Court in *Abbott* is whether the action for which review is sought constitutes "final agency action". Where the action sought to be reviewed constitutes final agency action it is ripe for judicial review. The test of justiciability is already met where purely legal questions of constitutional or statutory authority are present, or where as here, there are questions relating to the scope of the Executive authority.

An examination of this case reveals that the agency regulations and actions here constitute "final" agency action. As already explained, the two important issues we raise will not even be addressed in the administrative proceeding. To require St. Regis to exhaust a proceeding that is fruitless and the result foreordained is a travesty and an unjustified burden.

There is no need for the development of an administrative record since the issues which St. Regis seeks to raise relate to the authority of the Agency to act as it

has said it will act. Moreover, the OFCCP's position on the underlying questions raised by this petition are firmly imbedded in agency regulations which are binding on those who will conduct and decide the "administrative" proceeding. The result is foreordained. Only its legality is in issue. As the Second Circuit stated in *Diapulse Corporation of America* v. *Food and Drug Administration,* 505 F.2d 75, at 78 (2nd Cir. 1974):

> Since the issue here is whether the proposed fees were legally authorized there is no need to develop a detailed factual record for purposes of decision, nor is there any area for the exercise of discretion. And on this legal question of authorization, agency expertise is of little help to a reviewing court.

Accord: American Nursing Homes Assn. v. *Cost of Living Council,* 497 F.2d 909, 913 (10th Cir. 1974); *Ashland Oil Company of California* v. *Federal Energy Administration,* 389 F. Supp. 1119, 1123 (N.D. Cal. 1975).

The likelihood that St. Regis as well as other Federal contractors would be subjected to yet additional show cause notices threatening *de facto* debarment is a certainty. In *Illinois Tool Works* v. *Marshall,* —— F. Supp. ——, 17 FEP 520 (N.D. Ill. 1978), the court found *de facto* debarment violative of the plaintiff's due process rights. As to plaintiff's standing to bring the matter, the Court stated:

> Since plaintiff is now obtaining the administrative hearing which it originally sought, defendants further assert that there is no longer a justiciable controversy between the parties. However, the alleged violation of E.O. 11246 remains unchanged, and therefore defendants could still disqualify the plaintiff from government contracts and from subcontracts with other government contractors. . . .

> Thus, plaintiff has alleged a governmental policy which can adversely affect its interests, an alleged violation of the Federal Constitution which is capable of repetition and which defendants cannot render moot merely by granting an administrative hearing. See Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) at 125-26, Gray v. Sanders, 372 U.S. 368 (1963); see also Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers International Union, AFL-CIO, 447 F.2d 945, 947, (7th Cir. 1971). [17 FEP at 522.]

With respect to exhaustion of remedies, *Illinois Tool* further noted that issuance of a show cause notice, and resulting status to a government contractor,

> are steps in the administrative process which can cause harm to the plaintiff, which can be repeated . . . and which the plaintiff is entitled to have reviewed by this Court . . . . *Therefore, the pending administrative proceeding does not remove the allegedly unconstitutional harm which can be caused by another letter to show cause.* [*Id.*, emphasis supplied.]

The Administrative Law Judge in the pending administrative proceeding stated at a hearing held on October 20, 1978, that the "pass-over" issue would not be an issue in the case before him:

> I thought I had indicated I had at an early prehearing conference indicated the passover, whether you [St. Regis] had been passed over for contracts without a hearing, was not an issue in this case. . . . [App. G.]

While not positing the issue of backpay and other retrospective relief as a non-issue like that of the passover, it is clear that the ALJ intended to convey the

impression that that was not what concerned him and that he would give short shrift to it.

> I also indicated that with regard to the scope of the authority of the Secretary in promulgating regulations and the constitutionality of the regulations on their face, it is generally accepted that Administrative Agencies and Administrative Law Judges of those agencies, have to accept the validity of the regulations and the constitutionality of the regulations. [App. G.]

CONCLUSION

For the above reasons, we respectfully submit that the Petition for Certiorari should be granted. The Executive Order relating to equal employment obligations of government contractors had its genesis in 1941 and has undergone revision at various times and now stands as Executive Order 11246. These changes have been accompanied by a proliferation of Federal Regulations purporting to draw their authority from the Executive Order. The legitimacy of the Executive Order is itself questionable. OFCCP apparently seeks to duplicate and to a degree preempt the function of the agency established by Congress to *remedy* violations of equal employment rights—the EEOC. It is, we respectfully suggest, time for this Court to examine these competing structures and clarify the rules that apply.

Respectfully submitted,

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APPENDIX

APPENDICES

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APPENDIX A

ST. REGIS PAPER CO. v. MARSHALL

U.S. COURT OF APPEALS, TENTH CIRCUIT (DENVER)

St. Regis Paper Company v. Marshall, Secretary of Labor, et al., No. 77-1280, January 31, 1979

* * * *

Appeal from the U.S. District Court for the District of Colorado (14 FEP Cases 1641). Affirmed.

* * * *

Before SETH, *Chief Judge,* and LEWIS and MCWILLIAMS, *Circuit Judges.*

Full Text of Opinion

LEWIS, *Circuit Judge*:—Plaintiff brought this action in the United States District Court for the District of Colorado challenging certain regulations, policies and practices of the Secretary of Labor, The General Services Administration (GSA) and the Office of Federal Contract Compliance Programs (OFCCP). This appeal is from a judgment of that court dismissing the action for failure to exhaust administrative remedies.

[FACTS]

In February, 1976, GSA conducted a routine inspection of plaintiff's Libby, Montana facility to determine compliance with Executive Order 11246, which requires government contractors to agree not to engage in discriminatory employment practices. GSA found that plaintiff had deviated from its affirmative action program in the employment of women, and a notice to show cause was issued on March 22, 1976, informing plaintiff that if it did not correct the violations within 30 days or show cause for its failure to do so, GSA would commence enforcement proceedings. The notice also advised plaintiff that it could be found nonresponsible to perform government contracts (i.e., "passed

over") unless and until the show cause notice was resolved. Plaintiff responded to the show cause notice by letter in which it outlined actions to GSA by which it proposed to correct the violation and requested GSA to rescind the notice in order to avoid subjecting plaintiff to "*de facto* debarment" from future government contracts. Plaintiff also sent a telegram to Lawrence Lorber, the director of the OFCCP pursuant to 41 C.F.R. § 60-2.2(b), seeking a determination that substantial issues of law or fact existed sufficient to require that plaintiff be afforded a hearing prior to determination of nonresponsibility. Mr. Lorber responded favorably to plaintiff's request and assured plaintiff that it would not be passed over pending resolution of the issues.

By letter of April 8, GSA rejected plaintiff's proposed corrective measures, and a second review of the Libby facility was conducted a week later, where GSA found an "affected class" of women who continued to suffer under plaintiff's alleged discriminatory practices. GSA recommended actions to plaintiff to resolve the violations alleged in the show cause notice and asked plaintiff to submit proposed class remedies by May 3. GSA later issued a second show cause notice based on the existence of an affected class, which also warned plaintiff that it could be found nonresponsible for failure to comply. GSA and plaintiff entered into a conciliation agreement on June 2 which resolved the issues raised in the March 22 notice, and the notice was withdrawn. Later that month, plaintiff wrote a second § 60-2.2(b) letter to the director of the OFCCP, seeking a determination that it was entitled to a hearing on the affected class issue prior to agency determination on nonresponsibility. Plaintiff also requested that GSA adjudicate in a consolidated administrative hearing all unresolved issues of law or fact based on the Libby compliance reviews and the two show cause notices. On June 2, 1976, the director granted plaintiff's requests and stated that plaintiff would not be passed over for any contract awards pending resolution of the issues. To date, however, no administrative hearing has been held.

In addition to the administrative procedures outlined above, on April 7 plaintiff filed its complaint in this action with the district court, challenging the validity of the relevant OFCCP regulations, both on their face and as administered. The trial court dismissed for failure to exhaust administrative remedies.

It has long been a rule of judicial administration that:

> [N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Myers v. Bethlehem Corp., 303 U.S. 41, 50-51, 1A LRRM 575 (footnote omitted).

This doctrine affords administrative agencies an opportunity to correct their own errors prior to judicial intervention, thus mooting many issues before they reach the courts. The exhaustion requirement also serves to maximize efficient administrative process by preventing repeated judicial interruption. Additional reasons for the exhaustion doctrine include respect for "notions of administrative autonomy" and an interest in preserving the effectiveness of agency operations, which could be threatened by "frequent and deliberate flouting of administrative processes." McKart v. United States, 395 U.S. 185, 195; Christian v. New York Department of Labor, 414 U.S. 614; Weinberger v. Salfi, 422 U.S. 749, 765.

[CONTENTIONS]

Plaintiff argues that the present action is excepted from the exhaustion requirement, however, on one or more of the following grounds:

1. The complaint raises important questions of law involving statutory interpretation and the constitutionality of regulations, which are within the expertise of courts rather than agencies.

2. Review by the agency would be expensive and fruitless since the agency is not likely to void its own regulation.

3. Agency rules constitute "final agency action" subject to pre-enforcement court review under the Administrative Procedure Act.

4. Plaintiff is prejudiced by the administrative delay in that it is subject to further show cause notices at its other facilities and is subject to *de facto* debarment nationally by virtue of the Libby show cause notice.

5. If plaintiff loses at the administrative level it will likely be permanently debarred with no assurance of being granted a stay pending court review.

We find these arguments to be unpersuasive and affirm the judgment of dismissal.

First, the mere fact that a complaint raises questions of statutory interpretation and constitutionality of regulations does not exempt the action from the exhaustion doctrine. Uniroyal, Inc. v. Marshall, 7 Cir., 579 F.2d 1060, 17 FEP Cases 1207. Agency review of the challenged regulations prior to judicial consideration is desirable even where pure questions of law are concerned, in order to provide the court with the benefit of the agency's considered interpretation of its enabling authority. Id. The administrative process further preserves the opportunity for the agency to correct an ill-conceived regulation and moot the issue without judicial interference. See Toilet Goods Ass'n v. Gardner, 387 U.S. 158; McKart v. United States, supra. The desirability of full agency consideration is particularly great where, as here, the plaintiff's challenge is to the regulation as applied to a specific set of facts, as well as on its face, so that ultimate judicial review, if necessary, will be facilitated by a complete administrative record. McGrath v. Weinberger, 10 Cir., 541 F.2d 249, cert. denied, 430 U.S. 933; Weinberger v. Salfi, supra.

[Second Assertion]

Plaintiff's assertion that it would be subjected to needless expense if required to pursue its administrative remedy is equally unconvincing. We refuse to assume that the administrative authorities will arbitrarily deny plaintiff relief to which he is entitled, United States v. Blair, 321 U.S. 730, and an administrative hearing cannot be deemed "futile" where plaintiff will be afforded a full opportunity to present evidence and argue its position. Myers v. Bethlehem Corp., supra. The normal litigation expenses which accompany pursuit of administrative relief likewise provide no basis for excusing plaintiff from the normal requirement that administrative avenues be fully explored before resort is had to the courts. State of California ex rel. Christensen v. F.T.C., 9 Cir., 549 F.2d 1321, cert. denied, 434 U.S. 876.

We need not be long detained by plaintiff's contention that it is not required to exhaust administrative remedies since review is here sought of "final agency action" within the meaning of 5 U.S.C. § 704.[1] The cases cited by plaintiff in support of this position deal with pre-enforcement challenges to agency rules or regulations where no further administrative proceedings were contemplated. E.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 149. The Court in Abbott Laboratories noted that agency action must not only be "final" to be properly reviewable, but the controversy must also be "ripe," in order to protect the agency from premature judicial interference. Thus, even assuming that final agency action is at issue here, since further and adequate administrative relief has been requested but not exhausted, the ripeness element fails and the courts need not entertain the action.

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[1] 5 U.S.C. § 704 provides in pertinent part as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

Plaintiff vigorously asserts that it is prejudiced by administrative delay, in that it continues to be subject to show cause notices at its other locations throughout the country, and is subject to *de facto* debarment from government contracts due to the outstanding show cause notice with respect to the Libby facility. Plaintiff introduced some evidence in the court below indicating that certain employees of the defendants have erroneously stated to other federal contracting officers that plaintiff is currently ineligible for government contracts. As the district court noted, however:

> [I]t is clearly evident that such statements are not within the spirit of the regulations or departmental policy as established by the individual named defendants. It seems clear that such employee errors will be corrected, if they have not already been corrected.
>
> In any event, plaintiff has failed to show that it is, or has been, entitled to any government contracts as low bidder during the pendency of this lawsuit. R. Supp. Vol. I, at 63.

We agree that plaintiff has made an insufficient showing of irreparable injury to justify excusing it from the exhaustion requirement, particularly where it has received specific assurances from the director of OFCCP that it will not be passed over pending resolution of the current dispute.

The possibility that further show cause notices will be issued to other of plaintiff's facilities similarly fails to justify creating an exception to the rule. Presumably, plaintiff will still be able to avail itself of the § 60-2.2(b) procedure that was employed here to escape a finding of nonresponsibility pending final determination of the legal questions here presented.

[Last Argument]

Lastly, plaintiff fails to qualify for exemption from the exhaustion requirement by raising the possibility that it

could be permanently debarred at the administrative level without assurance of being granted a stay pending judicial review. Such hypothesizing of conceivable injury is far too speculative and tenuous to mandate exemption from the normal rule at this juncture.

The judgment of dismissal is accordingly,

Affirmed.

APPENDIX B

ST. REGIS PAPER CO. v. USERY

U.S. DISTRICT COURT, DISTRICT OF COLORADO

St. Regis Paper Company v. Usery, Secretary of Labor, et al., No. 76-F-375, March 8, 1977

* * * *

On motion to dismiss employer's action challenging issuance of show-cause letter and procedures followed by U.S. Government agencies in implementing it. Action dismissed.

* * * *

Full Text of Opinion

SHERMAN G. FINESILVER, *District Judge*:—Plaintiff, after having been issued a show cause letter by the General Services Administration under 41 CFR 60-1.28 for violation of Executive Order 11246 relating to affirmative action programs, has brought this action for declaratory and injunctive relief. Plaintiff contends that the show cause notice issued under the regulations, goes beyond the scope of the authority granted under the executive order. Plaintiff also complains that the procedures used by defendants will deprive plaintiff of the ability to compete for government contracts without first affording it a hearing. Finally, plaintiff states that publication of its alleged violation of affirmative action obligations portends irreparable injury.

Defendants have filed a motion to dismiss the complaint based on plaintiffs' failure to exhaust administrative remedies. For the reason stated below we grant the motion to dismiss.

Plaintiff is a federal contractor with over 100 facilities throughout the United States. As a contractor it must comply with the affirmative action duties prescribed by Executive Order 11246 and the regulations promulgated thereunder by the Secretary of Labor. If a contractor is found in violation of the Executive Order or regulations, the

particular agency in charge of compliance may issue a 30-day show cause notice to the contractor. The contractor must then either correct the violation within 30 days or show cause why enforcement proceedings should not be initiated.

The mere existence of a show cause notice may cause the contractor to be passed over for federal contracts even if it is the low bidder on the contract. The contractor will not be passed over if the Director of the Office of Federal Contract Compliance Programs determines that substantial issues of law or fact exist with relation to the alleged violation. In such a case a hearing must be had prior to a finding of "non-responsibility" and the contractor being passed over. The show cause notice may be rescinded if the compliance officer reaches some accommodation with the contractor in its affirmative action performance.

A more permanent disbarment or termination of existing federal contracts can also occur, but only after an evidentiary hearing before a hearing officer. Final agency decisions imposing sanctions are subject to judicial review under the terms of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

Plaintiff was issued a 30-day show cause notice on March 22, 1976. A conciliation agreement was reached between plaintiff and compliance officer/defendant Santistevan on June 6, 1976 and the notice was rescinded. A second 30-day show cause notice was issued on May 14, 1976 which alleged non-compliance with a claimed duty to provide restitution to an "affected class" of female employees who had submitted employment applications before the issuance of Executive Order 11246.

On June 29, 1976 defendant Lorber determined that "a substantial issue of law or fact has been raised" concerning the issue of restitution to an affected class "and that St. Regis will not, therefore, be passed over without a hearing." (Exhibit 11 to defendant's Motion.)

Some "evidence" exists that certain government personnel have mistakenly indicated to federal contracting officers that plaintiff is to be passed over. Other evidence indicates that such information is contrary to the present position of the Department of Labor, and that plaintiff should not be passed over while the issues of law and fact remain outstanding.

Plaintiff filed this lawsuit prior to participating in any hearings on the May 14, 1976 show cause notice. The Tenth Circuit has stated that it is "axiomatic that a litigant must exhaust his administrative remedies . . . as a prerequisite to invoking the jurisdiction of the federal court." Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973). Plaintiff insists, however, that in cases where the issues revolve around statutory interpretation the exhaustion doctrine does not apply. In such cases, plaintiff contends, the courts are as well equipped, if not better equipped, to make the necessary determinations. Agency expertise is simply not relevant to issues of statutory interpretation, so it is argued. In support of its position plaintiff cites McGee v. United States, 402 U.S. 479 (1971); McKart v. United States, 395 U.S. 185 (1969); and Ashland Oil Co. v. Federal Energy Administration, 389 F.Supp. 1119 (N.D. Calif. 1975).

While all the cases cited contain language indicating that exhaustion is not required where statutory interpretation is at issue, all contain a factual element not evident here: in each of the cases the action appealed from was *final agency action.*

In a recent pronouncement from the Tenth Circuit, the court noted, quoting Professor Davis: "We commit to administrative agencies the power to determine constitutional applicability [of legislation to particular facts], but we do not commit to administrative agencies the power to determine constitutionality of legislation." McGrath v. Weinberger, 541 F.2d 249, 251 (10th Cir. 1975). The instant suit is based on the constitutionality of the agency's application

of the Executive Order to a particular set of facts—that of an affected class. Thus, under the McGrath rationale, we find the doctrine of exhaustion of remedies applies.

Of course, a mere finding that the doctrine initially applies does not end our inquiry. "When the administrative remedy is wholly inadequate and a federal question is plainly presented, or where the delay in attempting to exhaust administrative remedies would be prejudicial and cause irreparable injury" judicial review is proper despite a failure to exhaust. Frost v. Weinberger, 375 F.Supp. 1312 (E.D.N.Y. 1974, citing Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973). In the instant case we do not believe that the administrative remedy is wholly inadequate nor that an attempt to exhaust such remedies would subject plaintiff to irreparable injury. As stated by the Supreme Court in McGee, supra, "a strict exhaustion requirement tends to ensure that the agency have additional opportunities 'to discover and correct its own errors,' and thus may help to obviate all occasion for judicial review.'' McGee at 484. At this point, the defendants have had no formal opportunity to review plaintiff's arguments. Defendant Lorber has admitted that there exist "substantial issues of *law* and fact." The agency should be given the initial opportunity to interpret the Executive Order under which it functions. To do otherwise would be to allow judicial review prior to every original application of a statute or executive order by an administrative agency.

The Supreme Court in McKart followed a similar logic. There the Court observed that it is "generally more efficient for the administrative process to go forward without interpretation than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals." 395 U.S. at 194.

If we were presented with a circumstance which indicated irreparable injury to plaintiff should judicial consideration

be denied, our decision would be modified. In this case, however, plaintiff has failed to demonstrate a real case of irreparable injury. Plaintiff has indicated that certain employees of the defendants have incorrectly stated to other federal contracting officers that plaintiff is not eligible for government contracts at the present time. Nonetheless, it is clearly evident that such statements are not within the spirit of the regulations or departmental policy as established by the individual named defendants. It seems clear that such employee errors will be corrected, if they have not already been corrected.

In any event, plaintiff has failed to show that it is, or has been, entitled to any government contracts as low bidder during the pendency of this lawsuit. Without such an entitlement, and without a demonstration that plaintiff was denied any contract, we cannot find that any irreparable injury exists or is threatened. Finally, plaintiff is not being denied government contracts without a prior hearing. Thus, we find no reasons for taking this case out of the general exhaustion requirement.

Our ruling is buttressed by the memorandum opinion of the District of Columbia Circuit in Kerr Glass Mfg. Corp. v. Usery, unpublished, No. 75-2225 (Jan. 27, 1977) which involved similar facts.

Order

Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies, filed September 29, 1976, is granted.

The Motion of the Equal Employment Advisory Council to File a Brief as Amicus Curiae, and its Motion for an Extension of Time to File, filed February 24, 1977, is denied.

In light of our dismissal, all other pending motions are moot.

The complaint and cause of action is dismissed.

APPENDIX C

E.O. 11246 on Nondiscrimination Under Federal Contracts

Following is the text of Executive Order 11246, signed by President Johnson September 24, 1965, and reads as last amended by Executive Order 12086, effective October 8, 1978.

Executive Order 11246 also was amended by Executive Order 11375, signed October 13, 1967.

Under and by virtue of the authority vested in me as President of the United States by the Commission and statutes of the United States, it is ordered as follows:

Part I—Nondiscrimination in Government Employment

Ed. Note: Secs. 101-105, barring discrimination in federal employment on account of race, color, religion, sex, or national origin, were superseded by Executive Order 11478. These provisions called for affirmative-action programs for equal opportunity at the agency level under general supervision of the Civil Service Commission; establishment of complaint procedures at each agency with appeal to the Commission; and promulgation of regulations by CSC.

Part II—Nondiscrimination in Employment by Government Contractors and Subcontractors

Ed. Note: Executive Order 12086, signed by President Carter consolidated federal contract compliance authority for equal employment opportunity and affirmative action in the Labor Department's Office of Federal Contract Compliance Programs. The order, effective October 8, 1978, eliminated the compliance functions of the following 11 agencies: Departments of the Treasury; Defense; Interior; Commerce; Heath, Education, and Welfare; Housing and Urban

Development; Transportation; Energy; Environmental Protection Agency; General Services Administration, and Small Business Administration.

Subpart A—Duties of the Secretary of Labor

Sec. 201. The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order.

Subpart B—Contractors' Agreements

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of Sep-

tember 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, "that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the Secretary of Labor as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement

of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided,* That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further,* That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C—Powers and Duties of the Secretary of Labor and the Contracting Agencies

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this

Order. The Secretary of Labor shall be responsible for securing compliance by all Government contractors and subcontractors with this Order and any implementing rules or regulations. All contracting agencies shall comply with the terms of this Order and any implementing rules, regulations, or orders of the Secretary of Labor. Contracting agencies shall cooperate with the Secretary of Labor and shall furnish such information and assistance as the Secretary may require.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor.

(b) The Secretary of Labor may receive and investigate complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Govern-

ment designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D—Sanctions and Penalties

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the equal employment opportunity provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the Secretary of Labor.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Pursuant to rules and regulations prescribed by the Secretary of Labor, the Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section.

Sec. 210. Whenever the Secretary of Labor makes a determination under Section 209, the Secretary shall promptly notify the appropriate agency. The agency shall take the action directed by the Secretary and shall report the results of the action it has taken to the Secretary of

Labor within such time as the Secretary shall specify. If the contracting agency fails to take the action directed within thirty days, the Secretary may take the action directly.

Sec. 211. If the Secretary of Labor shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.

Sec. 212. When a contract has been cancelled or terminated under Section 209(a)(5) or a contractor has been debarred from further Government contracts under Section 209(a)(6) of this Order, because of noncompliance with the contract provisions specified in Section 202 of this Order, the Secretary of Labor shall promptly notify the Comptroller General of the United States.

Subpart E—Certificates of Merit

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency

from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—Nondiscrimination Provisions in Federally Assisted Construction Contracts

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertakings pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the Secretary of Labor such information as the Secretary may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor pursuant to Part II, Subpart D, of this

Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303. (a) The Secretary of Labor shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as the Secretary may require in the performance of the Secretary's functions under this Order.

(b) In the event an applicant fails and refuses to comply with the applicant's undertakings pursuant to this Order, the Secretary of Labor may, after consulting with the administering department or agency, take any or all of the following actions: (1) direct any administering department or agency to cancel, terminate, or suspend in whole or in part the agreement, contract or other arrangement with such applicant with respect to which the failure or refusal occurred; (2) direct any administering department or agency to refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received by the Secretary of Labor from such applicant; and (3) refer the case to the Department of Justice or the Equal Employment Opportunity Commission for appropriate law enforcement or other proceedings.

(c) In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided,* That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—Miscellaneous

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

Sec. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

Sec. 405. This Order shall become effective 30 days after the date of this Order.

APPENDIX D

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
DEPARTMENT OF LABOR

Rules and Regulations

Chapter 60—Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor

Part 60-1—Obligations of contractors and subcontractors

§ 60-1.26 Enforcement proceedings.

(a) *General.* Violations of the Order, equal opportunity clause, the regulations in this chapter, or of applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings to enforce the Order and to seek appropriate relief. Violations may be found based upon, inter alia, any of the following: (i) The results of a complaint investigation; (ii) analysis of an affirmative action program; (iii) the results of an on-site review of the contractor's compliance with the Order and its implementing regulations; (iv) a contractor's refusal to submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review to be conducted; (vi) a contractor's refusal to supply records or other information as required by these regulations or applicable construction industry requirements; or (vii) any substantial or material violation or the threat of a substantial or material violation of contractual provisions of the Order, or of the rules or regulations issued pursuant thereto.

(2) If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations have not been corrected in accordance with the conciliation procedures in this chapter, OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek ap-

propriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions, or any of the above. However, if the contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow the OFCCP access to its premises for an on-site review; and if conciliation efforts under this chapter are unsuccessful, OFCCP, notwithstanding the requirements of this chapter, may go directly to administrative enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above. Whenever the Director has reason to believe that there is substantial or material violation or the threat of substantial or material violation of the contractual provisions of the Order or of the rules, regulations or orders issued pursuant thereto, he/she may refer the matter to the Solocitor of Labor to institute administrative enforcement proceedings as set forth in this section or refer the matter to the Department of Justice to enforce the contractual provisions of the Order, to seek injunctive relief (including relief against noncontractors, including labor unions, who seek to thwart implementation of the Order and regulations) and to seek such additional relief, including back pay, as may be appropriate. There are no procedural prerequisites to a referral to the Department of Justice by the Director, and such referrals may be accomplished without proceeding through the conciliation procedures in this chapter, and a referral may be made at any stage in the procedures under this chapter: *Provided,* That no order for debarment from further contracts or subcontracts pursuant to section 209(a)(6) of the Order shall be made without affording the contractor an opportunity for a hearing, either administrative or judicial.

Part 60-2—Affirmative action programs

Pursuant to Executive Order 11246, sections 201, 205, 211 (30 F.R., 12319), and 41 CFR 60—1.6, 60—1.28, 60—

1.29, 60—1.40, Title 41 of the Code of Federal Regulations is hereby amended by adding a new Part 60—2 to read as set forth below.

Authority: 5 U.S.C. 553(a)(3)(B); 29 CFR 2.7; Section 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SUBPART A—GENERAL

§ 60-2.1 Title, purpose and scope.

(a) This part shall also be known as "Revised Order No. 4" and shall cover nonconstruction contractors. Section 60-1.40 of this chapter, affirmative action compliance programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, develop a written affirmative action compliance program for each of its establishments. A review of compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and the Government in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C of this part are concerned with affirmative action plans only.

(b) Relief, including back pay where appropriate, for members of an affected class who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

§ 60-2.2 Agency action.

(a) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of its establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 F.R. 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the equal employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate OFCCP field, area, regional, or national office has accepted such plan unless within 45 days thereafter the Director has disapproved such plan.

(b) If, in determining such contractor's responsibility for an award of a contract, it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance Programs or other Government agencies, that the contractor has no affirmative action program at each of its establishments, or has substantially deviated from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer shall declare the contractor/bidder nonresponsible and so notify

the contractor and the Director unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Director to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request shall set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60-1.26 or the Director may require the investigation or compliance review be developed further or additional conciliation be conducted: *Provided,* That during any preaward conferences, every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet its equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further,* That a contractor/bidder may not be declared nonresponsible more than twice due to past noncompliance with the equal opportunity clause at a particular establishment or facility without receiving prior notice and an opportunity for a hearing.

(c)(1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, that fact shall be recorded in the investigation file. Whenever administrative enforcement is contemplated, the notice to the contractor shall be issued

giving him 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the case file shall be processed for enforcement proceedings pursuant to § 60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with Part 60-30 of this chapter.

(3) During the "show cause" period of 30 days, every effort will be made through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the case shall be processed for enforcement proceedings pursuant to § 60-1.26 of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

APPENDIX E

Conciliation Agreement

In the matter of:

U.S. General Services Administration
Office of Contract Compliance, Region 8

St. Regis Paper Company
Lumber & Plywood Division
Libby, Montana 59923

A show cause notice having been filed March 22, 1976, against St. Regis Paper Company, Lumber & Plywood Division, Libby, Montana (hereinafter referred to as the "Contractor") as a result of certain deficiencies in its Affirmative Action Program determined by the General Services Administration, Office of Contract Compliance, Region 8 (hereinafter referred to as "GSA") the parties do resolve to conciliate this matter as follows:

I. General Provisions

1. It is understood that this Agreement does not constitute an admission by the Contractor of any violation of Executive Order 11246, as amended, and is entered into on a voluntary basis to reaffirm and further the Contractor's policy of providing Equal Employment Opportunity for all persons without regard to race, color, religion, sex, or national origin.
2. Subject to the performance by the Contractor of all promises and representations contained herein, the Contractor's obligations to GSA in the resolution of this matter shall be deemed to be fulfilled.
3. Nothing herein is intended to relieve the Contractor from compliance with Executive Order 11246, as amended, and the rules and regulations promulgated by the U.S. Department of Labor, Office of Federal Contract Compliance Programs, and the GSA reserves the right to monitor such compliance.

4. The Contractor, having made the commitments in II below to correct certain deficiencies, the GSA, pursuant to authority granted under 41 CFR 60-1.20 (b), finds the Contractor in compliance with Executive Order 11246, as amended, and the regulations of the Department of Labor issued pursuant thereto, with the exception of certain issues in litigation.
5. This determination of compliance is specifically conditioned on the Contractor's continued application of good faith efforts to meet said commitments.
6. The Contractor is hereby notified that the making of these commitments does not preclude future determinations of non-compliance based on a finding that the commitments are not sufficient to achieve compliance.
7. All specified commitments made by the Contractor in this agreement are for the purpose of bringing said Contractor into a posture of compliance with Executive Order 11246, as amended, and its affirmative action requirements, and are not an admission of liability to any individual persons.
8. This determination of compliance shall have no effect on any pending claim or claims of discrimination filed against the Contractor pursuant to any federal, state, or local laws. Neither shall this determination of compliance be considered to have determined or resolved any questions of law or fact upon which the validity of any such claim or claims may depend.

II. Specific Provisions

1. The Contractor has established the following goals for the employment of women in the job categories indicated for the remainder of 1976:

Category	No.	Percentage
Craftsmen (skilled)	3	1%
Operatives (semi-skilled)	10	4%
Laborers (unskilled)	41	13%

2. The GSA has accepted the above goals with the proviso that it will perform a follow-up on-site inspection in January, 1977, for the purpose of reviewing the established goals and determining whether the percentage goals are properly established for the year 1977.

3. The Contractor will document all good faith effort to recruit women in the job categories in which they are underutilized, as follows:

   a. In view of the possibility that current female clerical employees might be interested in production jobs that may become available, the Personnel Department will consult with each such employee to advise them of their eligibility. The attached form will be completed by each, and witnessed by a personnel representative. If such an employee desires, she will be given an equal opportunity to be assigned to such a job when it is available.

   b. Employment procedure will be modified during any period when females are underutilized in a job group or category, to provide greater opportunity to reduce the underutilization and if possible reach parity. During such periods, all female applicants will be advised of their eligibility for available production jobs, as well as for clerical jobs, depending upon their qualifications.

All parties have read this agreement and accept the provisions contained herein.

St. Regis Paper Company

Date June 2, 1976 By /s/ M. A. Roberts
M. A. Roberts
Corporate Manager EEO
St. Regis Paper Company
150 E. 42nd Street
New York, New York 10017

Date 6-2-76 By /s/ Dennis J. Santistevan
General Services Administration

ATTACHMENT

ST. REGIS PAPER COMPANY

Libby, Montana

Equal Employment Opportunity
Affirmative Action

I understand I am eligible for a job in a production unit at a Libby Operation of St. Regis Paper Company, depending upon my qualifications for the specific job available.

I was —— was not —— interested in a production job at the time I applied for work. If so, I did —— did not —— indicate my interest in a production job to the Company.

I am —— am not —— interested at this time in transferring to a production job. If not, I understand I may advise the Personnel Department at any time of my interest in doing so.

I understand that if I transfer to a production job I will retain my full company service (my last date of hire) for purpose of employee benefits.

Date: ——————

_____
Employee Signature

_____
Witness

ADDENDUM TO CONCILIATION AGREEMENT

Under I. GENERAL PROVISIONS, page 1, part 4 shall be changed to read as follows:

4. The Contractor, having made the commitments in II below to correct certain deficiencies, the GSA, pursuant to authority granted under 41 CFR 60-1.20(b), finds the Contractor in compliance with Executive Order 11246, as amended, and the regulations of the Department of Labor, issued pursuant thereto, with the exception of those issues contained in a show cause notice issued to St. Regis Paper Company on May 14, 1976, concerning the contract compliance status of the Libby, Montana facility.

Under II. SPECIFIC PROVISIONS, page 3, add the following:

4. The physical stature requirement referred to in the March 22, 1976, letter have been discontinued.

Date June 2, 1976 By /s/ M. A. ROBERTS
M. A. Roberts
Corporate Manager EEO
St. Regis Paper Company
150 E. 42nd Street
New York, New York 10017

Date 6-2-76 By /s/ DENNIS J. SANTISTEVAN
General Services Administration

APPENDIX F

5/14/76

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Mr. W. R. Haselton, President
St. Regis Paper Company
633 Third Avenue
New York, New York 10017

Dear Mr. Haselton:

Reference is made to the Contract Compliance Review which was conducted at Libby, Montana facility April 14, 1976. Additional references to my letter to Mr. M. A. Roberts, dated April 22, 1976, which raises new issues relating to the identification of an affected class of female applicants and female employees at the Libby facility. Under date of April 29, 1976, Mr. William A. Gershuny responded to my letter to Mr. Roberts. Mr. Gershuny's letter fails to address itself to these new issues. Accordingly, this agency is issuing the Notice to Show Cause why enforcement proceedings under Section 209(b) of Executive Order 11246, as amended, should not be instituted.

This Show Cause Notice is based upon the charge of the existence of the affected class of females as stated above. The names of the female class members are listed on the attachment to this letter.

This Show Cause Notice is issued in addition to the Show Cause Notice dated March 22, 1976. You are cautioned that the two Notices are based upon different grounds and, therefore, each requires appropriate corrective action.

The circumstances which prompt this Notice are the result of additional information gained concerning the deficiencies which were addressed in the March 22, 1976 30-day Show Cause Notice. In connection with this notification, you are required to take steps to correct the fact that some female applicants and current female employees are today suffering the effects of past discrimination. The corrective action must commence with a case-by-case evaluation of injury inflicted, and be matched with remedies that will make whole those injured parties. The remedies should include, but will not be limited to, employment and retroactive awards of pay and service credits. Should you not correct the deficiencies within 30 days or show cause for your failure to do so, proceedings will be instituted as required by Executive Order 11246, as amended, and Revised Order No. 4 of the United States Department of Labor. These proceedings may include a notice of proposed cancellation or termination of existing Federal contracts or subcontracts and debarment from future contracts and subcontracts.

It remains the sincere desire of this agency to continue all feasible efforts to assist you in preventing the necessity of having to take such severe action. In this regard, I remain available to confer or meet with you at any mutually

agreed upon time and date. Additional conferences or meeting will not, however, extend the 30 day period.

Sincerely,

/s/ DENNIS J. SANTISTEVAN
Dennis J. Santistevan
Acting Regional Director
Office of Contract Compliance

cc: Mr. Douglas Kilmer
Resident Manager
St. Regis Paper
Company
General Delivery
Libby, Montana 59923

Mr. Roy P. McCrary
EEO Coordinator
St. Regis Paper
Company
P.O. Box 1593
Tacoma, Washington
98401

Mr. M. A. Roberts
Corporate Manager
EEO
St. Regis Paper Company
633 Third Avenue
New York, New York 10017

Director, OFCC
AARD—OFCC—Region 8
AR(4)
Commissioner—F
Official file—8ARC
Reading file—8ARC
8ARC;RCBcwean:bn:5/12/76

Concurrence:

..... Date.....
Assistant Regional Director,
Office of Contract Compliance

..... Date.....
Regional Counsel

cc:

Region 1	Region 4	Region 7
Region 2	Region 5	Region 9
Region 3	Region 6	Region 10

Information Copy: Regional Administrator—8A

ATTACHMENT

30-Day Show Cause Notice

dated May 12, 1976

1. All female applicants who applied for employment for other than clerical jobs between January 1976 to present, and were qualified for entry level production (laborers) jobs at a time when the company was hiring males, but were nevertheless not considered for these positions.

Paula Halstead
Kathy B. Schmasow
Aloe Mitchell
Jo Claire Phillips
Cherly Brock
O. Maurie Tilton
Joann Ringsbye
Helen L. Stoddard
Marilyn Kair
Linda Robertzian
Betty Larson
Debbie Hansen
Carrol Brock
Lindy Mellem
Elizabeth J. Pritchard
Myrtle A. Robertson
Phyllis Anderson
Devi L. Olsen
Shirley Woods
Shery Carlson
Clarise T. Britton
Myrna Nartens
Pat Smith
Margaret M. Smith
Lena McCallum
Doris Underwood
Joanne E. Serne
Suzette L. Howlett
Karen E. Stephens
Bobette Lynne Wade
Dixie A. Wicks
Barbara Clemmons
Renee Siefke
Susan A. Smith
Deborah Wilke
Linda Sharp
LouAnn Smith
Sherry McKean
Peggy Cann
Dorothy Olsbury
Cindy Hagen
Tina Briggs
Kerri Everett
Bethene Candee
Lillian Martinez
Younda Montgromery
Janet Schmidig
Lucy Platts
Valerie Redd
Lynn Ingrum
Barbara Cassidy

2. Current female clerical employees who were qualified for production work at time of hire during period when the company was hiring males, and who did not express a preference only for clerical work.

3. Female employees hired into labor/production jobs who were not considered for employment at the time of their original application, this group includes but is not limited to:

Edna Meely
Carla K. Couture
Bonnie Wood
Gail I. Burrows
Regina Hovland

4. All former female clerical employees who were qualified for production work at the time of hire during a period when the company was hiring males, and who did not express a preference only for clerical work.

APPENDIX G

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 78-OFCC-1

In the Matter of

UNITED STATES DEPARTMENT OF LABOR, *Plaintiff*

vs.

ST. REGIS PAPER COMPANY, *Defendant*

Chart Room, Seventh Floor
Vanguard Building
1111 Twentieth Street, N.W.
Washington, D.C.
Friday, October 20, 1978

Hearing in the above-entitled case was convened, pursuant to notice, at 11:30 a.m., the Honorable GARVIN LEE OLIVER, Administrative Law Judge, presiding.

APPEARANCES:

JEAN E. DAVIS, Esq., SUZAN CHASTAIN, Esq., and GARY M. BUFF, Esq., Office of General Counsel, U.S. Department of Labor, Washington, D.C., on behalf of plaintiff.

JUDITH S. WALDMAN, Esq., and GUY FARMER, Esq., Farmer, Shibley, McGuinn & Flood, Bender Building, Washington, D.C. 20036, accompanied by: Michael A. Roberts, Manager, Equal Employment Opportunity; on behalf of defendant.

. . .

JUDGE OLIVER: No.

MR. FARMER: We had raised another question as to that.

JUDGE OLIVER: Yes.

With regard to scope of the authority of the Secretary to promulgate the 1977 regulations, 41 CFR 60-2.2(b) and (c), I think I indicated that I understood that to be relating perhaps to the jurisdiction of this Office to hear such complaints and to proceed with an enforcement proceeding.

And you informed me that you were more concerned about the regulation dealing with passover.

MR. FARMER: Without a hearing.

JUDGE OLIVER: Yes, without a hearing.

I also indicated that with regard to the scope of the authority of the Secretary in promulgating regulations and the constitutionality of the regulations on their face, it is generally accepted that Administrative Agencies and an Administrative Law Judge of those agencies, have to accept the validity of the regulations and the constitutionality of the regulations.

However, I will rule on that question in such a fashion that you will be able to preserve those issues for review by the Secretary and the courts if necessary; and I will also interpret the regulations and the Executive Order in light of the facts developed in this case, and in light of constitutional law, whatever.

I believe we then moved on to the passover.

MRS. WALDMAN: Your Honor, excuse me.

In your last statement I perhaps mistakenly understood you to include then both in our Roman A-I and II, then our reference to 41 CFR 60-2.1(b) as well as 60-2.2(b) and (c).

Are you saying you would rule on those, or make some determination of those at the end of this proceeding?

You then stated "on the passover", but I thought we had just discussed that in our Section 60-2(b) and (c).

MR. FARMER: Yes, I thought we had already covered the passover question; perhaps you have some other thought in mind.

JUDGE OLIVER: I though I had indicated I had at an early prehearing conference indicated the passover, whether you had been passed over for contracts without a hearing, was not an issue in this case; and I indicated to you that upon reconsideration I thought the purpose of an administrative proceeding was to allow the administrative officials to correct their own errors.

And, so, if despite the assurance you will not be passed over, you can show that you have been, then that should be brought to the attention of the Secretary in my proposed decision and order, and should be dealt with as part of your defense in this case.

MR. FARMER: Yes, you did make that statement; that is correct. As part of our defense we could, would be permitted to show if we desired or could, the government did not comply with its own regulations; or that they had actually passed us over without a hearing.

That is what my notes indicate. I think that is the same thing that you said.

JUDGE OLIVER: Yes.

MRS. WALDMAN: Your Honor, I think to the extent we discussed, we can show that the government—not all the government employees did, in fact, comply with the government's instructions and procedures. We are more likely to be able to prove, establish that as a point. We do have a deposition from the Bureau of Engraving which establishes there was at least one government employee that did not know that we were declared not responsible; and to go to the next step and prove we were passed over might be impossible of proof.

But to the extent I believe that we can establish that not all government employees were properly notified that we were not—no longer to be considered nonresponsible; would that constitute sufficient proof to leave open the question of the validity of the fact of the dormant issue for your resolution.

JUDGE OLIVER: Ms. Davis?

MS. DAVIS: That is not my understanding of what you had ruled. I do not believe that their being able to prove that in fact some official within the contracting scheme did not receive the notices, that we believe were sent out, is sufficient to raise the question of the validity of the regulations in the manner in which they would choose to do so.

I think that it is our position, of course, we took all the necessary steps to insure that in fact they would not be passed over; and there may be a factual question as to whether or not disseminated information was in fact relayed to everyone; but I do not think that can go to the point—as far as I would choose to go on it.

MR. FARMER: I would say I think I am somewhat confused at this point.

I did not understand that the Judge, your Honor, was going to rule on the validity of the regulations. The regulation permits passover without hearing. It is discretionary as to whether or not they give you an assurance they will not pass you over under the regulation.

JUDGE OLIVER: Yes.

MR. FARMER: They may or may not do that.

I understood only—just for clarification, and not that this is particularly in our favor—that you had said that we could show that we were, having been promised we would not be passed over, we were in fact passed over; that that would be an issue that you would allow us to proceed on.

But I did not understand you were saying that even if we showed that, that you would then rule on the validity of the regulation.

I am just seeking clarification.

JUDGE OLIVER: That is my understanding.

MS. DAVIS: Yes.

JUDGE OLIVER: Mr. Farmer stated it.

MRS. WALDMAN: I think you just lost me.

I guess what I understood was that in the event we could establish that the government policy, notwithstanding that they had said we were not to be passed over, that that information did not reach everyone it was to have reached; and that we could establish that some contracting officer did tell someone that we were nonresponsible; that that would be sufficient to raise the question of whether or not the government had the right—the Secretary of Labor had the right—to say you could be passed over without a hearing under the Executive Order.

JUDGE OLIVER: No, that was not my intention. But I merely wanted to let you know that if you could show that the government had violated its own regulations, then there would probably be a remedy for that; and that I would entertain that defense on your part; and, if appropriate, recommend a remedy for that.

MRS. WALDMAN: So then to clarify, there would be no ruling in any event on whether or not the Secretary had the right to promulgate this de facto departmental [sic-debarment] regulation under the Executive Order.

JUDGE OLIVER: No. Not from what I see in the case, it is not my intention to rule on that case, on that motion; because I see the facts in this case as we discussed; it seems that prior to the declaration of nonresponsibility you did state that there were substantial issues in the case; and

at that point you were assured by the government that you would not be passed over.

I merely indicated if you had proof to the contrary, that should be allowed as a defense; and there should be some remedy for it.

. . .

No. 78-1642

In the Supreme Court of the United States

OCTOBER TERM, 1978

ST. REGIS PAPER COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 591 F. 2d 612 (Pet. App. 1a-7a). The opinion of the district court is reported at 14 F.E.P. 1641 (Pet. App. 8a-12a).

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1979. The petition for a writ of certiorari was filed on April 27, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal contractor subject to the provisions of Exec. Order No. 11246 and its implementing regulations is required to exhaust available administrative remedies before filing suit in court to challenge any such regulation

and its application to the contractor, where the contractor has not shown that it will lose government contracts or suffer other irreparable injury during the pendency of the available administrative proceeding and where the outcome of that proceeding may make judicial relief unnecessary.

STATEMENT

Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), and Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978),[1] requires those who contract or subcontract with the federal government to agree as part of their contractual undertakings not to engage in employment practices that discriminate on the grounds of race, sex, religion or national origin.[2] Those contractors or subcontractors who have fifty or more employees and a contract of more than $50,000 must agree to act affirmatively to ensure that employees and applicants for employment are treated in a non-discriminatory fashion (41 C.F.R. 60-1.40(a), 43 Fed. Reg. 49247-49248 (1978)).[3] In addition,

[1]Exec. Order No. 11246 as amended is reprinted as Appendix C to the petition (Pet. App. 13a-26a).

[2]Executive orders prohibiting discrimination by federal contractors and subcontractors on grounds of race, religion, color and national origin were first promulgated by President Roosevelt and have been in effect continuously since 1948. For a history of those orders, see *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159, 168-171 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

[3]On October 20, 1978, the Office of Federal Contract Compliance Programs amended its regulations implementing Exec. Order No. 11246 to take account of the 1978 amendments to the Order (43 Fed. Reg. 49240), and corrective amendments were issued on October 31, 1978 (43 Fed. Reg. 51400). Unless otherwise noted, the citations in this brief are to the amended regulations as they appear in the Federal Register.

under Section 202(4) of the Executive Order, all contracts, except those in certain exempt categories, must contain provisions requiring the contractor to comply with the regulations of the Secretary of Labor implementing the Executive Order. The Secretary's regulations call for the enforcement of the Executive Order through, *inter alia*, an administrative process that includes a full hearing before an administrative law judge, who submits a recommended decision to the Secretary or other agency officer responsible for the formulation of a final agency order. See 41 C.F.R. 60-1.26(c) (43 Fed. Reg. 42946 (1978)), 41 C.F.R. 60-30 *et seq.* (43 Fed Reg. 49259-49264, 51401 (1978)). Judicial review of such orders is available under 28 U.S.C. 1331(a) and the Administrative Procedure Act, 5 U.S.C. 704. Exec. Order No. 11246 is now enforced by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor; at the time the underlying controversy arose, it was enforced both by the OFCCP and by various federal agencies designated as contract compliance agencies.[4]

[4]Exec. Order No. 11246, as amended, delegates responsibility for administering and enforcing contractors' equal employment agreements to the Secretary of Labor (Section 201) but provides that the Secretary may redelegate his functions under the Order to any other executive agency (Section 401). The Secretary has delegated the administration of the Order to the Director of the Office of Federal Contract Compliance Programs (OFCCP), an office within the Department of Labor (41 C.F.R. 60-1.2 (43 Fed. Reg. 49241 (1978)). Prior to the issuance of Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978), amending Exec. Order No. 11246, and at all times relevant to this case, the Director of the OFCCP was authorized to designate various federal agencies as "compliance agencies" having primary responsibility for enforcing Exec. Order No. 11246. See 41 C.F.R. 60-1.3, 60-1.6 (1975). Exec. Order No. 12086 has now centralized enforcement (in addition to administration) of Exec. Order No. 11246 within the Department of Labor.

Petitioner, a major producer of lumber, lumber products, paper and related products, has entered into a substantial number of contracts with the federal government containing the required non-discrimination and affirmative action provisions (Pet. 3). In February 1976 the General Services Administration (GSA), the agency then charged with ensuring that petitioner adhered to its contractual obligations under Exec. Order No. 11246, conducted a compliance review at petitioner's plant in Libby, Montana.[5] GSA determined that petitioner had breached its agreements under the Executive Order program by failing to hire female applicants for laborer positions and by failing to make a good faith effort to increase the number of women it employed. On March 22, 1976, GSA issued a show cause notice informing petitioner that, if it did not correct its violations within 30 days or show cause for its failure to do so, GSA would commence proceedings to enforce petitioner's obligations under the Executive Order (Appendix A, *infra*, 1a-2a). In accordance with 41 C.F.R. 60-2.2(b) (1975), the notice also advised petitioner that "St. Regis Paper Company can be found non-responsible to perform any government contract until this show cause notice is finally and favorably resolved" (Appendix A, *infra*, 2a).

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[5]The primary method of enforcing the Executive Order and its implementing regulations is the conduct of compliance reviews, in which the contractor's employment practices and policies and the resulting employment conditions are analyzed (41 C.F.R. 60-1.20(a) and (b) (43 Fed. Reg. 49245 (1978)). If a contractor fails to comply with its Executive Order obligations, its contracts may be cancelled, terminated or suspended, and the contractor may be debarred, *i.e.*, declared ineligible for further government contracts (Exec. Order No. 11246, Section 209(a)(5) and (a)(6)). Suits by the Department of Justice to enforce the contractual obligations are also contemplated as an alternative enforcement procedure (*id.* at Section 209(a)(2); 41 C.F.R. 60-1.26(e) and (f) (43 Fed. Reg. 49247 (1978)).

If it came to the attention of a federal contracting officer that a contractor—bidder was not in compliance with the Executive Order or its implementing regulations, he could declare the bidder nonresponsible and therefore ineligible to receive a new contract even if it were the the low bidder; the contracting officer could simply "pass over" the low-bidding contractor in awarding the contract (41 C.F.R. 60-2.2(b) (1975)). Under the applicable regulations, however (*ibid.*), petitioner was entitled to request a hearing prior to a determination of nonresponsibility, if the proposed determination of "nonresponsibility" "raise[d] substantial issues of law or fact." In accordance with this procedure, on April 6, 1976, petitioner requested the Director of the OFCCP to require that it be afforded a hearing prior to an agency determination of nonresponsibility (Pet. App. 2a). The Director granted petitioner's request and assured it that it would not be "passed over" pending resolution of the dispute (Pet. App. 2a). On June 2, 1976, petitioner and GSA entered into a conciliation agreement concerning the issues raised by the March 22, 1976, show cause notice, and that notice was withdrawn (*ibid.*).

During GSA's investigation of petitioner, GSA determined that there was a group of female employees who had been adversely affected by petitioner's allegedly discriminatory employment practices. As a result, on May 14, 1976, after attempts to conciliate this matter failed, a second show cause notice was issued to petitioner (Pet. App. 2a, 40a-45a). Unlike the March 22, 1976, show cause notice, this notice did not specifically indicate that petitioner was subject to being passed over for future contracts (Pet. App. 40a-42a). Petitioner again requested the Director of the OFCCP to require that a hearing be held prior to any agency determination of nonresponsibility (Pet. App. 2a). In addition, petitioner requested

that all unresolved issues be adjudicated at a consolidated hearing (*ibid.*). On June 29, 1976, the OFCCP again granted petitioner's requests and stated that petitioner would not be passed over for any contract award before receiving a hearing on the May 14, 1976, show cause notice (Pet. App. 9a).

Petitioner instituted this suit on April 7, 1976. The initial complaint, filed the day after petitioner's first request that it be afforded a hearing prior to being found nonresponsible, challenged the March 22, 1976, show cause notice and alleged that petitioner was unlawfully being found nonresponsible without a hearing. On May 18, 1976, petitioner filed an amended complaint effectively challenging the May 14, 1976, show cause notice by alleging that the defendants were without authority to require petitioner to remedy its discriminatory actions against the affected class of female employees as a condition to continued performance of government contracts.

On March 8, 1977, the district court dismissed petitioner's complaint. The district court found that there was no justification for petitioner's failure to exhaust its administrative remedies before invoking the jurisdiction of the federal courts (Pet. App. 10a). The court noted that petitioner's challenge to the agency's attempt to obtain retrospective remedies for the class of females allegedly discriminated against by petitioner's employment practices turned on "a particular set of facts" (Pet. App. 10a-11a), and the circumstance that a legal question was involved—whether the Executive Order authorized such remedies—could neither convert the May 14, 1976, show cause order into final agency action nor justify an exception to the exhaustion doctrine (*ibid.*). In addition, the district court found that petitioner was "not being

denied government contracts without a prior hearing" (Pet. App. 12a). Thus, the court held, petitioner was not entitled to judicial intervention because it had established neither "that the administrative remedy [was] wholly inadequate nor that an attempt to exhaust such remedies would subject [petitioner] to irreparable injury" (Pet. App. 11a).

The court of appeals affirmed the district court in all respects. The court found that application of the exhaustion doctrine is particularly appropriate in this case because petitioner's "challenge is to the regulation as applied to a specific set of facts, as well as on its face, so that ultimate judicial review, if necessary, will be facilitated by a complete administrative record" (Pet. App. 4a). For similar reasons, the court rejected petitioner's contention that exhaustion was not required because it was challenging the OFCCP's regulations, the promulgation of which was "final." The court held that "since further and adequate administrative relief [respecting application of those regulations] has been requested but not exhausted" the case was not ripe for judicial review (Pet. App. 5a).

The court of appeals also affirmed the district court's finding that petitioner would not suffer irreparable injury pending adminstrative review. The court held (Pet. App. 6a):

> We agree [with the district court] that [petitioner] has made an insufficient showing of irreparable injury to justify excusing it from the exhaustion requirement, particularly where it has received specific assurances from the director of OFCCP that it will not be passed over pending resolution of the current dispute.

Petitioner's speculation that it might face injury from the issuance of show cause notices at its other facilities was rejected by the court because petitioner "will still be able to avail itself of the * * * procedure that was employed here to escape a finding of nonresponsibility pending final determination of the legal questions here presented" (*ibid.*). Finally, the court discounted petitioner's contention that it would suffer irreparable injury *if* it were unsuccessful in the administrative proceedings and *if* a stay pending judicial review were denied, because "[s]uch hypothesizing of conceivable injury is far too speculative and tenuous to mandate exemption from the normal rule [of exhaustion] at this juncture" (Pet. App. 7a).

ARGUMENT

The decisions and concurrent findings of the lower courts are correct, there is no conflict among the courts of appeals on the question presented, and further review is not otherwise warranted.

As petitioner recognizes (Pet. 6), the only issue before this Court is whether the lower courts erred in determining that petitioner was required to exhaust available administrative remedies before seeking judicial review of the application and validity of the OFCCP's regulations enforcing Exec. Order No. 11246.[6] It is settled that ordinarily "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). This doctrine, which is fully applicable to disputes between the federal government and its contractors

[6]This case thus does not present any question concerning the Executive's authority to issue Exec. Order No. 11246. See generally *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979).

(*United States* v. *Blair*, 321 U.S. 730, 734-737 (1944); see also *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963)), has been codified by Congress in the Administrative Procedure Act, which defines reviewable agency action as "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Even where agency action—*e.g.* the formulation of an agency rule—may be considered final (*Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136, 149 (1967)), judicial review is not warranted if the controversy is not "ripe" for adjudication. *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967). Thus judicial review of agency regulations is not appropriate where the controversy arises out of a particular attempt to enforce the rule and "further administrative proceedings are contemplated" (*Abbott* Laboratories, *Inc.* v. *Gardner, supra*, 387 U.S. at 149), where the administrative process in the context of a particular case may throw some light on the substance and "practical justifications for the regulation" (*Toilet Goods Association* v. *Gardner, supra*, 387 U.S. at 166), or where "no irremediable adverse consequences flow from requiring a later challenge" to the regulations in question (*id.* at 164; see also *Diamond Shamrock Corp.* v. *Costle*, 580 F. 2d 670 (D.C. Cir. 1978)). The ripeness requirement is necessary "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories, Inc.* v. *Gardner, supra*, 387 U.S. at 148-149.

In the present case petitioner seeks judicial review of agency regulations that agency officials have declared will not be applied to petitioner in this controversy and of other regulations that may or may not be applied to petitioner, depending on the outcome of an ongoing agency proceeding. Petitioner's challenge to 41 C.F.R. 60-2.2(b) (43 Fed. Reg. 49249-49250, 51400 (1978))—the regulation it characterizes as authorizing *de facto* contract debarment without a hearing (Pet. 8-9)—represents nothing more than an abstract disagreement with the regulation as petitioner construes it; for petitioner has twice sought and twice obtained the OFCCP's assurances that petitioner will not be passed over for any contracts before it has received a full agency hearing on the allegations that its Libby, Montana, plant is not in compliance with Exec. Order No. 11246 (Pet. App. 2a).[7] Petitioner's challenge to regulations providing for retrospective remedies for violations of the Executive Order (41 C.F.R. 60-1.26(a)(2) and 60-2.1(b) (43 Fed. Reg. 49246, 49249 (1978)) has a basis in a concrete controversy, but that controversy has yet to be resolved through the administrative process. Moreover, if it is

[7]Because both courts below found that petitioner has not shown that it has been or will be denied federal contracts without a hearing (Pet. App. 6a, 12a), it is immaterial whether, as petitioner contends (Pet. 20), it is being denied an opportunity to litigate the "pass-over" issue in the administrative hearing on the May 14, 1976, show cause notice. If the regulation is not being applied to petitioner, it has no valid claim for relief, either administrative or judicial. In petitioner's implicit attack on the concurrent factual findings of the courts below that it is not being denied government contracts without a hearing (Pet. 10), petitioner fails to demonstrate any factual errors by the courts, much less "a very obvious and exceptional showing of error" that might warrant review by this Court. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); see also *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

resolved in petitioner's favor—if, for example, it is determined that there is no past discrimination against an "affected class" of females to be remedied or that the remedies sought are otherwise inappropriate—then the controversy about the validity of the regulations in question will be moot. If the remedies are applied to petitioner, then, as the court of appeals observed (Pet. App. 4a), judicial review "will be facilitated by a complete administrative record."

In sum, because administrative proceedings involving certain of the challenged regulations are in progress, because those proceedings will produce a record that could be helpful to a court if judicial relief is ultimately required, and because petitioner has made no showing that it will suffer irreparable harm as a result of being required to exhaust its administrative remedies before seeking judicial relief, the courts below were correct in concluding that petitioner has presented no issues ripe for judicial review.[8]

[8]Petitioner is incorrect in suggesting, by its citation to *Diapulse Corp. of America* v. *FDA*, 500 F. 2d 75 (2d Cir. 1974), and *American Nursing Home Ass'n* v. *Cost of Living Council*, 497 F. 2d 909 (Temp. Emer. Ct. App. 1974) (Pet. 19), that the decision in this case conflicts with decisions of other courts of appeals. In *Diapulse*, a case concerning the authority of an agency to impose certain search fees as a condition to disclosing documents requested under the Freedom of Information Act, 5 U.S.C. 552, the court noted that there was "no administrative proceeding to interrupt, since Diapulse has chosen not to seek administrative review of the validity of the fees the FDA staff proposed"; and the court concluded that the fees were almost certainly being made a condition to disclosure of the particular documents requested. 500 F. 2d at 78. As noted, here there is an administrative proceeding in progress, and it is not known whether any of the forms of relief that petitioner claims are unauthorized will ultimately be ordered. In *American Nursing Home Ass'n* the court stated, as the applicable rule, that exhaustion of remedies is not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
VINCENT F. O'ROURKE, JR.
Attorneys

JUNE 1979

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essential in cases dealing "solely" with statutory interpretation. 497 F. 2d at 913. This is not such a case, for,as the court of appeals observed (Pet. App. 4a), the application of regulations to a specific set of facts, as well as purely legal issues, is involved here.

DOJ-1979-06

APPENDIX A

UNITED STATES OF AMERICA

GENERAL SERVICES ADMINISTRATION

Region 8
Federal Center
Denver, CO 80225

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MAR 22 1976

Mr. Douglas Kilner
Resident Manager
St. Regis Paper Company
General Delivery
Libby, Montana 59923

Dear Mr. Kilner:

A compliance review was conducted of your St. Regis Paper Company facility in Libby, Montana, on February 24, 1976, by a member of this staff. The findings reflect that your company is not in compliance with the requirements relating to equal employment opportunity. Consequently, this agency is herewith issuing this notice to show cause why enforcement proceedings under Section 209 (b) of Executive Order 11246, as amended, should not be instituted.

In connection with this notification, you are required to take steps to correct these deficiencies, as cited in the attached listing, within 30 days. Should you not correct the deficiencies within the aforementioned prescribed time period, or show cause for your failure to do so, proceedings will be initiated as required by Executive

Order 11246, as amended, and Revised Order Number 4 of the United States Department of Labor. These proceedings may include a notice of proposed cancellation or termination of existing Federal contracts or subcontracts and debarment from future contracts and subcontracts.

It is the sincere desire of this agency to continue all feasible efforts to assist you in preventing the necessity of having to take such severe action. In this regard, Mr. Richard Bowman, telephone number (303) 234-2175, will be available to confer or meet with you at any mutually agreed upon time and date. Additional conferences or meetings will not, however, extend the 30 day period, but they may expedite your attainment of compliance status.

You are hereby advised that St. Regis Paper Company, can be found non-responsible to perform any government contract until this show cause notice is finally and favorably resolved.

Sincerely,

/s/ DENNIS J. SANTISTEVAN

DENNIS J. SANTISTEVAN
Acting Regional Director
Office of Contract Compliance

Enclosure

cc:
Mr. Roy P. McCrary
EEO Coordinator
St. Regis Paper Company
P.O. Box 1593
Tacoma, Washington 98401

ATTACHMENT TO SHOW CAUSE NOTICE
DATED MARCH 22, 1976:

1. Deficiencies noted in the initial GSA, February 15, 1972, on-site review:

a) The deficiency or underutilization of women in the composition of the workforce.

2. Deficiencies identified during the February 24, 1976, on-site review:

a) The deficiency of underutilization of women continues to exist with no significant change in the female composition of the workforce, as of December 31, 1975.

b) St. Regis Paper Company, Libby, Montana, failed to exercise the corrective action necessary to achieve the established goals and execute the established equal employment opportunity policy.

c) The following comprise the basis of noncompliance with Executive Order 11246, as amended:

1) Bona fide occupational qualifications justifying a particular sex as a condition of employment have not been established, however, arbitrary standards are used to deny employment opportunity to women.

Hiring opportunity is systematically denied women by the application of arbitrary and capricious physical standards which are impossible to apply uniformly.

One such physical standard is termed "Adequate Physical Stature." As defined by the Manager of Personnel, Mr. Frank Peck, "Adequate Physical

Stature" is a minimum of 125 pounds, unless, if in the opinion of the interviewer, the applicant is wiry (appears to be able to perform the work).

2) Females have been adversely effected in selection/hiring actions. As a percent of total female laborers rejected, women were rejected for employment because of inadequate stature, at far higher proportions than men were rejected, in violation of Executive Order 11246, as amended, as implemented by Part 60-3, Title 41 Code of Federal Regulations, Section 60-3.3.

3) Employment opportunity was denied women in the recruitment and hiring of 51 temporary, summer employees. Part 60-20, 41 CFR, Section 60-20.2 (a) requires that employers must recruit from both sexes. Since only male applicants for those vacancies are on file, it is evident that St. Regis Paper Company, Libby, Montana, did not recruit women.

4) For the past five years, the number of women employed and the kinds of positions they hold, have remained virtually unchanged due to lack of good faith efforts on the part of the contractor.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
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THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE ALASKA LUMBER & PULP COMPANY

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BRIEF OF AMICUS CURIAE ALASKA LUMBER & PULP COMPANY

Pursuant to Rule 42.1 of the Supreme Court of the United States, Alaska Lumber & Pulp Company has obtained the consent of both parties to file a brief amicus curiae. A copy of a letter from each party granting consent has been filed with the clerk of the Court.

QUESTIONS PRESENTED

Must administrative remedies be exhaused if:

a. A litigant is threatened with economic coercion which prevents an effective challenge to the regulations upon which the agency's action is based; or

b. Administrative regulations are challenged as being beyond an agency's authority and an agency's refusal to consider this challenge ensures a litigant's defeat at an administrative hearing; or

c. A litigant is threatened with irreparable harm and no governmental interest is served by further administrative proceedings; or

d. A sanction an agency seeks to impose in enforcement proceedings is clearly beyond its authority; or

e. Procedural regulations established by an agency to which a litigant is subjected are contrary to specific and unambiguous language of the agency's governing law?

STATEMENT OF AMICUS' INTEREST

Alaska Lumber & Pulp (ALP) appears as amicus curiae and urges acceptance of certiorari in this case because it is presently facing the same dilemma as St. Regis. It must either risk financial ruin by loss of government contracts while it proceeds through protracted but meaningless administrative procedures before it can litigate a critical issue of law, or pay financial tribute to retain its status as a government contractor.

ALP has a pulp mill in Sitka, Alaska which is wholly dependent upon contracts with the United States Forest Service as the source for its raw product. A debarment or passover from these contracts would close the mill at Sitka. Twelve hundred employees would be put out of work and ALP would suffer irreparable financial harm. Although ALP has entered into an agreement with the Office of Federal contract Compliance Programs (OFCCP) which provides for all the prospective relief possible under Executive Order 11246, the agency is issuing an Administrative Complaint and demanding retrospective back pay of between $500,000 and

$3,000,000 for an "affected class" of female job applicants.

ALP takes the position that OFCCP has no power under the Executive Order to exact back pay. That is a question of law which cannot be resolved under OFCCP regulations in administrative proceedings (see Part II infra), and which ALP ultimately must litigate, if at all, after payment of back pay or debarment for nonpayment. So long as OFCCP refuses to decide the legal issue of its authority to recover back pay and can use its debarment power after negative administrative findings to ruin a company which would choose post-exhaustion judicial review, it can extort huge sums of money from government contractors like ALP. This is too great a price for anyone's right to have an important question of law decided. This explains why, despite Executive Order 11246's thirteen-year existence, the legality of retrospective remedies has never been conclusively decided. ALP implores, as amicus curiae, that petitioner be allowed to present the question now without further exhaustion of meaningless remedies.

STATEMENT OF THE CASE

St. Regis Paper Company is a major producer of lumber and paper products. As a government contractor and subcontractor it must comply with the affirmative obligations imposed by Executive Order 11246 to achieve nondiscrimination in employment. General Services Administration (GSA), the designated compliance agency, reviewed St. Regis' employment practices at its Libby, Montana lumber mill and issued a show cause notice on March 22, 1976 claiming that St. Regis underutilized females and should be prohibited from further government contracting until its alleged deficiencies were satisfactorily corrected. Such a "passover" from government contracting is permitted by an OFCCP regulation, 41 C.F.R. § 60-2.2(b) (1978), although § 208(b) of Executive Order 11246 unambiguously requires an opportunity for a hearing before a contractor is barred from further government contracting. St. Regis' continued status as a government contractor and subcontractor was uncertain because it had not been assured it would not be passed over without a hearing. St. Regis

asked OFCCP, the agency primarily responsible for enforcing Executive Order 11246, for a hearing. St. Regis subsequently filed suit on April 7, 1976 in the United States District Court for the District of Colorado requesting that OFCCP's enforcement proceedings be enjoined until OFCCP complied with the hearing requirement of § 208(b). Two weeks later OFCCP gave St. Regis a conditional and ambiguous promise that it would not be passed over as a result of the March 22, 1976 show cause notice without a hearing.

OFCCP issued a show cause notice on May 14, 1976 seeking to recover back pay for St. Regis' alleged compliance deficiencies. Thereupon St. Regis amended its complaint by asking the court to declare back pay an impermissible remedy under Executive Order 11246.

GSA and St. Regis entered into a conciliation agreement on June 2, 1976 which resolved all issues pertaining to the March 22 show cause notice (Pet. App. 34a-37a). St. Regis received no assurance that the May 14 show cause notice would not be used

as a basis to prohibit it from government contracting, and St. Regis again requested a hearing before OFCCP. On June 29, 1976, while St. Regis' suit was still pending in the Colorado federal court, OFCCP assured St. Regis it would not be prohibited from contracting with the Government as a result of the second show cause notice.

OFCCP has indicated only factual matters will be examined at a hearing to determine if St. Regis should be subjected to back pay liability or prohibited from government contracting. OFCCP has flatly refused to consider St. Regis' two legal challenges: (1) OFCCP's practice of prohibiting government contracting until a show cause notice is favorably resolved violates § 208(b) of Executive Order 11246 and the Due Process Clause of the Fifth Amendment; and (2) OFCCP has no authority under Executive Order 11246 to recover back pay from a noncomplying contractor.

Both lower courts held that St. Regis must exhaust administrative proceedings. These holdings disregard the following facts: (a) the legal issues raised by petitioner challenge OFCCP's

action as being in excess of authority; (b) OFCCP's administrative law judge refuses to hear St. Regis' arguments and states he will not, under any circumstances, overturn its challenged regulations; and (c) denial of immediate judicial examination of OFCCP's actions threatens petitioner with irreparable harm caused by summary deprivation of government contracts before its challenge to OFCCP's regulations is resolved in court.

SUMMARY OF ARGUMENT

A. Exhaustion forces a government contractor either to risk being deprived of contracts or capitulate to OFCCP by paying back pay. This threatened economic coercion immunizes OFCCP's questionable regulations from effective legal challenge. Unless this threat is removed, the legality of OFCCP's practice of passing over contractors without a hearing and its authority to demand back pay will remain academic issues.

B. Additional administrative proceedings are pointless, because OFCCP refuses to consider petitioner's challenge to its regulations. Even if

OFCCP's conduct was not so cavalier, agency expertise is not germane when regulations are challenged as being in excess of an agency's authority. Such a challenge is particularly appropriate for judicial resolution.

C. Exhaustion threatens petitioner with irreparable harm because it may irrevocably lose government business before its challenges are considered in court. No administrative purpose is served by requiring additional and fruitless administrative proceedings.

D. Exhaustion will not be required if an agency: (1) clearly is exceeding its authority; (2) violates an ambiguous directive of its governing law; or (3) commits a clear constitutional violation. OFCCP's demand for back pay falls within the first exception, for it is not authorized by Executive Order 11246 and is not a legitimate implied remedy. OFCCP's practice of "passing over" a "nonresponsible" contractor until it proves compliance clearly violates § 208(b) of the Executive Order, which requires that a contractor have

an opportunity for a hearing before being prohibited from government contracting. This practice also violates due process. Only in extraordinary circumstances may contractual property rights be suspended before a hearing. Not only are such circumstances absent, but OFCCP's procedures threaten a contractor with summary deprivation of its economic lifeblood unjustified by any administrative necessity.

ARGUMENT

I. Exhaustion Threatens a Government Contractor with Economic Coercion Which Operates to Immunize OFCCP's Questionable Regulations from Effective Legal Challenge.

This petition does not simply raise another garden-variety question about exhaustion of administrative remedies. Continued regard for this case as involving a pedestrian exhaustion issue would not only harm petitioner irreparably but would have grave implications for thousands of government contractors, of which amicus curiae is one, dependent upon government business for their economic well-being, but who are subject to the vagaries of OFCCP's uncontrolled life-or-death

power over them. Both lower courts treated this litigation as a routine exhaustion case without appreciating that it involves the enforcement arm of an executive department which operates without statutory authorization, and is restrained only by the vaguest procedural regulations, which, as this Court has recently intimated, are of questionable validity. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1719-20 (1979).

Requiring exhaustion is tantamount to sanctioning an extortionate practice. It insulates OFCCP's regulations from effective challenge. Contractors cannot afford the loss of government contracts which would follow from an adverse administrative determination while they pursue a judicial challenge. It is bitterly ironic that in the present case an adverse determination will be based on the very regulations which petitioner sought to challenge, but which the lower courts refused to permit. Exhaustion thus requires a contractor to pursue an uncertain and perilous path, for it must risk summary deprivation of its means of economic subsistence. Given the great

hazard involved and the uncertainty of success, a contractor cannot risk traveling this path. Without immediate judicial examination of OFCCP's regulations, a contractor is forced to risk its well-being upon OFCCP's unrestrained discretion to forbid it from contracting with the goverment while the contractor seeks administrative or judicial relief. A contractor thus faces a harsh and brutally simple choice: either challenge OFCCP's action and take the risk of incurring a debilitating loss of contracts, or capitulate to OFCCP by paying tribute in the form of back pay to ensure economic survival. See B. Schlei & P. Grossman, Employment Discrimination Law 202 (Supp. 1979).

In unexaggerated terms, dealings with OFCCP are characterized by threatened or actual economic strangulation rather then procedural regularity and fairness. OFCCP can blithely issue show cause notices, secure in the knowledge that a contractor cannot effectively contest its action since it does not know if OFCCP will decide not to pass it over until its legal challenge, which OFCCP itself will not consider, is resolved in court. Such an abuse

of proper administrative procedure can be prevented only by ensuring a contractor it will not be denied Government contracts prior to a hearing, during administrative appeals, and before judicial review should the contractor not prevail at the hearing. Since petitioner received only the first assurance, it should not be required to pursue the pointless hearing offered by OFCCP.

Only if the exhaustion impediment is removed can OFCCP be prevented from insulating its dubious regulations from effective legal challenge. Such a challenge is imperative, for "the extent of OFCCP enforcement authority must now be viewed as the preemient issue in equal employement law." Kilberg, OFCCP -- Enforcement and Back Pay Issues, 3 Employee Relations L.J. 347, 352 (1978).

II. Exhaustion is Unnecessary Because Administrative Expertise is not Germane when Regulations Are Challenged as Exceeding an Agency's Authority, and that Agency Refuses to Consider the Challenge.

To determine if exhaustion of administrative remedies should be required, OFCCP's administrative scheme must be rigorously scrutinized. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 765 (1975). The

only allegations petitioner has made in the present case are that OFCCP's regulations permitting passover without prior hearing[1] and recovery of back pay[2] are in excess of the authority granted to OFCCP by Executive Order 11246. OFCCP has refused, and its regulations prevent, consideration of petitioner's legal challenge. 41 C.F.R. § 60-30.6(b) (1978). OFCCP intends to subject petitioner to the delay, expense, and threatened economic coercion which accompany further administrative proceedings when OFCCP has foreclosed by its own actions and pronouncements the only issues petitioner wishes to advance. The result of such a "hearing" is preordained, and exhaustion should not be required when "it is clear beyond doubt that the . . . agency will not grant the relief in question." American Federation of Government Employees

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1 41 C.F.R. § 60-2.2(b) (1978).

2 41 C.F.R. § 1.26(a)(2) (1978); 41 C.F.R. § 60-2.1(b) (1978).

v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973). See L. Jaffe, Judicial Control of Administrative Action 466 (1965).

OFCCP has, in effect, taken a final position, and hence final administrative action, on petitioner's challenge to its regulations. This Court has long recognized that a litigant will not be compelled to traverse a barren administrative path. See, e.g., Weinburger v. Salfi, 422 U.S. 749, 765-66 (1975); NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 428 n.8 (1968); United States v. Anthony Grace & Sons, 384 U.S. 424, 429-30 (1966); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 34 (1934). See L. Jaffe, Judicial Control of Administrative Action 466 (1965). If an agency is unresponsive to a challenge to its regulations, exhaustion is futile and will not be required. American Federation of Government Employees v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973). See Air Products & Chemicals, Inc. v. United Gas Pipeline Co., 503 F.2d 1060, 1063 (Temp. Emer. Ct. App. 1974); Consumers Union

of the United States, Inc. v. Cost of Living Council, 491 F.2d 1396, 1399-1400 (Temp. Emer. Ct. App.), cert. denied, 416 U.S. 984 (1974); Bradley v. Laird, 449 F.2d 898, 900 (10th Cir. 1971); Philips Petroleum Co. v. FEA, 435 F. Supp. 1239, 1248 (D. Del. 1977); Garmon v. Warner, 358 F. Supp. 206, 208-09 (W.D.N.C. 1973). Similarly, failure to consider legal issues, here OFCCP's passover practice and authority to recover back pay, renders exhaustion pointless.[3] If an agency has taken a final position on a crucial matter in issue, as OFCCP has done concerning its passover practice and authority to demand back pay, a litigant has no obligation to seek further administrative recourse in the vain hope that the agency may do an abrupt about-face and change its own regulations. See Consumers Union of the United States, Inc. v. Cost

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3 Philips Petroleum Co. v. FEA, 435 F. Supp. 1239, 1248 (D. Del. 1977). A purported administrative remedy must be relevant to a litigant's claim. L. Jaffe, Judicial Control of Administrative Action 428 (1965). Since the "remedy" of a hearing offered by OFCCP will not address petitioner's challenge to its regulations, the proffered remedy is irrelevant.

of Living Council, 491 F.2d 1396, 1399-1400 (Temp. Emer. Ct. App.), cert. denied, 416 U.S. 984 (1974); Philips Petroleum Company v. FEA, 435 F. Supp. 1238, 1248 (D. Del. 1977).

Even if OFCCP was willing to consider petitioner's arguments, exhaustion would not be required because "[c]ourts will not insist on exhaustion when the particular issue involved is a constitutional and/or legal one and is not one addressed to a particular area of administrative expertise." Comprehensive Group Health Board of Directors v. Temple University, 363 F. Supp. 1069, 1098 (E.D. Pa. 1973). The present case does not concern interpretation of OFCCP's regulations, a matter to which OFCCP could properly apply its expertise. The regulations are clear; petitioner challenges their very existence. When regulations are challenged as being in excess of authority, agency expertise is not relevant and the issue is particularly appropriate for judicial resolution. See Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Consumers Union of the United States, Inc. v. Cost of Living Council, 491

F.2d 1396, 1399 (Temp. Emer. Ct. App.), cert. denied, 416 U.S. 989 (1974); Borden, Inc. v. FTC, 495 F.2d 785, 787 (7th Cir. 1974); Fairchild, Arabatzis & Smith v. Sackheim, 451 F. Supp. 1181, 1186 (S.D.N.Y. 1977); K. Davis, Administrative Law Treatise § 20.04, at 74 (1958).

The Government's contention that the present case is unripe for judicial resolution because OFCCP has granted a hearing at which it might ostensibly find for petitioner[4] is ludicrous. Even if OFCCP's refusal to hear petitioner's arguments did not predetermine the result of a later proceeding, this Court has recognized sub silentio that the possibility of success on factual issues does not invaribly require that adminstrative remedies be exhausted.[5] Although § 208(b) unambiguously requires that a contractor be afforded a

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[4] Brief for Respondent at 11-12.

[5] K. Davis, Administrative Law Treatise § 20.00-1, at 149 (Supp. 1978) (explaining Mathews v. Eldridge, 424 U.S. 319 (1976)).

hearing before termination of government contracts, it was only after the present litigation was initiated that OFCCP promised petitioner a hearing before such a termination. Since 41 C.F.R. § 60-2.2(b) (1978) permits OFCCP to grant or deny a hearing in its unbridled discretion, St. Regis faced a dangerously uncertain future when it initiated the present action. St. Regis had no assurance that it would not be prohibited from contracting with the Government. Petitioner was thus compelled to seek judicial protection from OFCCP's threatened actions. Petitioner will be subjected to a flagrant inequity if it is forced to regress to a futile administrative proceeding which threatens it with irreparable harm, when the necessity of seeking judicial relief was brought about by OFCCP's noncompliance with its own governing law.

If a suit is proper at its inception a later promise by the Government cannot defeat it. See, Abbott Laboratories v. Gardner, 387 U.S. 136, 154 (1967). The argument that exhaustion is compelled if OFCCP decides to grant a hearing has recently

been decisively and unequivocally rejected:

> [P]laintiff has alleged a governmental policy which can adversely affect its interests, an alleged violation of the Federal Constitution which is capable of repetition and which defendants [OFCCP] cannot render moot merely by granting an administrative hearing.
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> ... The show-cause letter which plaintiff received . . . and the status into which plaintiff was put as a result of that letter, are steps in the administrative process which can cause harm to the plaintiff, which can be repeated at any time so far as the record shows, and which the plaintiff is entitled to have reviewed by this Court in our opinion. Therefore the pending administrative hearing does not remove the allegedly unconstitutional harm which can be caused by another letter to show cause.

Illinois Tool Works, Inc. v. Marshall, 17 E.P.D. 6375, 6376 (N.D. Ill. 1978), aff'd, 48 U.S.L.W. 2075 (7th Cir. July 20, 1979).

OFCCP's belated grant of hearing is an attempt to blunt petitioner's challenge to its regulations, but this offer neither protects petitioner from a post-hearing passover before judicial review, nor does it purge OFCCP's passover practice of its illegality.

III. Exhaustion Should not be Required Because It Threatens Petitioner with Irreparable Harm and Will Serve no Administrative Interest.

Even if some plausible purpose might be served by forcing petitioner to pursue administrative proceedings in which OFCCP will not consider its arguments, exhaustion is still discretionary; e.g., NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 426 n.8 (1968); United States v. Abilene & S. Ry., 265 U.S. 274, 282 (1924); Kale v. United States, 489 U.S. 449, 454 (9th Cir. 1973); and the harm to an individual if judicial relief is delayed must be balanced against any governmental interests favoring exhaustion.[6] Only two colorable interests support exhaustion here: (1) OFCCP should be permitted to make a decision concerning petitioner's challenge free from judicial intervention; and (2) exhaustion

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6 E.g., Eluska v. Andrus, 587 F.2d 996, 999 (9th Cir. 1978); Montgomery v. Rumsfeld, 572 F.2d 250, 253 (9th Cir. 1978); United States v. Newmann, 478 F.2d 829, 831 (8th Cir. 1973). See McKart v. United States, 395 U.S. 185, 197 (1969) (court must weigh governmental interest and burden upon litigant in determining if exhaustion is required). Professor Davis appears to approve of a balancing test for determining if exhaustion is appropriate. K. Davis, Administrative Law Treatise § 20.01, at 449 (Supp. 1976).

prevents contractors from deliberately flouting the administrative process. Montgomery v. Rumsfeld, 572 F.2d 250, 253 (9th Cir. 1978).

The first consideration is not germane for the simple reason that there will be no decision on petitioner's challenge, because OFCCP refuses to consider the only arguments St. Regis advances. Moreover, the issues raised by the present proceeding, the unconstitutional practice of denying government contracts without a hearing, and the purported authority under the Executive Order to passover a contractor and to recover back pay, challenge OFCCP's very authority. As noted earlier, such issues are clearly beyond administrative expertise, and judicial resolution of them would not infringe on OFCCP's decision-making independence.

The second consideration is equally inapplicable. A contractor who receives a show cause notice has no inkling whether it will be granted a hearing, for OFCCP possesses unfettered discretion either to approve or reject a contractor's hearing request. There is simply no established process

for a contractor to flout, because the entire administrative process, if any, is created according to the happenstance exercise of OFCCP's discretion. A contractor thus does not know if any process will even exist until OFCCP rules on its request for a hearing. Nor can a contractor placidly await OFCCP's decision. During that interim between the issuance of a show cause notice and OFCCP's decision, a Damoclean threat hangs over that contractor's economic survival, for it may be deprived of contracts without any procedural protection. A contractor will be motivated to seek immediate judicial relief, not because it wishes to obstruct an established administrative procedure, but rather because it must seek to avoid OFCCP's threatened economic extortion. It is ludicrous to assert that exhaustion is necessary to prevent flouting an administrative process OFCCP can choose either to establish or not when it is precisely OFCCP's coercive tactics which impel a contractor to seek judicial relief simply to survive. In requesting judicial protection a contractor merely responds naturally to the economic bludgeon wielded by OFCCP.

While no administrative interest would be served by denying immediate judicial examination of OFCCP's conduct, such a denial threatens petitioner with irreparable harm. Although OFCCP has ambiguously promised St. Regis it will not be denied government contracts prior to a hearing, it has no assurance that it will not be prohibited from receiving valuable subcontracts. See 41 C.F.R. § 60-1.4(b)(7) (1978). Since OFCCP refuses to consider the only arguments petitioner wishes to make, the result of any hearing is preordained. If petitioner does not receive government contracts during the interim between an adverse decision at a hearing and the time a court reviews the legality of OFCCP's practices, St. Regis will incur unrecoverable financial losses and disruption of its planning and operations. See Sunstrand Corp. v. Marshall, 17 E.P.D. 7138, 7141 (N.D. Ill. 1978); Pan American World Airways, Inc. v. Marshall, 439 F. Supp. 487, 497 (S.D.N.Y. 1977). The possibility that petitioner could avoid this havoc by securing a preliminary injunction prohibiting a passover is remote, because it would be compelled to satisfy

arduous criteria as a prerequisite to such extraordinary relief.[7] Neither has OFCCP assured St. Regis that debarment or passover would be stayed pending judicial resolution of petitoner's challenges. The threatened irreparable harm to petitioner is clear and immediate, and petitioner has no plausible prospect for obtaining relief in the interim between its loss in an administrative hearing and a judicial determination of the legality of OFCCP's actions.

Balancing the devastating threat facing petitioner from a denial of judicial relief prior to completing administrative proceedings against any

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[7] A preliminary injunction is a discretionary and extraordinary remedy with the burden on the movant to show: (1) it will be irreparably harmed if the injunction is not granted; (2) its interests outweigh any injury to the Government if the injunction is granted; (3) probable success on the merits; and (4) an injunction would be in the public interest. 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 430-31 (1973). Accord 7, Pt. 2 Moore's Federal Practice § 65.04[1] (2d ed. 1979). See, e.g., Uniroyal, Inc. v. Marshall, 48 U.S.L.W. 2100 (D.C. Cir. July 26, 1979) (debarred contractor's request for injunction pending appeal denied).

countervailing administrative interests demonstrates exhaustion is inapplicable.

IV. Exhaustion of Administrative Remedies Is Improper Because OFCCP's Purported Authority to Recover Back Pay Is Clearly Beyond the Powers Granted to It by Executive Order 11246, and OFCCP's Passover Practice Is a Plain Violation of § 208(b) of the Executive Order

Exhaustion will not be required if an administrative agency: (1) clearly exceeds its delegated authority; (2) acts contrary to specific and unambiguous language of its governing law;[8] or (3) violates the Constitution.[9] To determine

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8 Fairchild, Arabatzis & Smith v. Sackheim, 451 F. Supp. 1181, 1184 (S.D.N.Y. 1978); Pan American World Airways, Inc. v. Boyd, 207 F. Supp. 152, 160 (D.D.C. 1962). See Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562-63 (1919) (Brandeis, J.); Coca-Cola Co. v. FTC, 475 F.2d 299, 303 (5th Cir.), cert. denied, 414 U.S. 877 (1973); State of California ex rel. Christensen v. FTC, 549 F.2d 1321, 1324 (9th Cir. 1977). In Leedom v. Kyne, 358 U.S. 184 (1958), this Court held that judicial review of administrative action will be permitted if the agency clearly acts in excess of its delegated authority or contrary to a clear directive of its governing law.

9 McCormick v. Hirsch, 460 F. Supp. 1337, 1344 (M.D. Pa. 1978).

if the first exception applies, the derivation of OFCCP's purported authority under Executive Order 11246 to recover back pay must be examined. The second exception to the exhaustion doctrine is applicable if OFCCP's practice of passing over a contractor is clearly contrary to the Executive Order's specific directive in § 208(b) that a contractor may not be debarred without an opportunity for a hearing. The last exception is germane if a passover violates the Due Process Clause of the Fifth Amendment. We now turn to an examination of these questions.

A. OFCCP's Purported Authority to Recover Back Pay Clearly Exceeds the Powers Delegated to it by Executive Order 11246.

The sanctions for violating Executive Order 11246[10] are precise and prospective, whereas

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10 The only sanctions mentioned in § 209 of Executive Order 11246 are: (1) publishing the names of violators of the Executive Order; (2) recommending enforcement action by the Department of Justice; (3) recommending to the Equal Employment Opportunity Commission and the Department of Justice that Title VII proceedings be filed; (4) recommending to the Department of Justice that criminal proceedings be filed if a contractor furnishes false information; (5) termination, suspension or cancellation of existing contracts; and (6) debarment from further contracting.

back pay is not specified, is imprecise, and is a retrospective remedy. Because back pay is not expressly mentioned, its validity must rise or fall on whether it can be legitimately implied as a permissible punitive or remedial measure.

Back pay is not a punitive sanction, as it is a restitutionary remedy designed to compensate victims of discrimination, and not to punish. See Curtis v. Loether, 415 U.S. 189, 197 (1974); Pearson v. Western Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1376 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.), petition dismissed, 404 U.S. 1006 (1971). Cf. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 176 (3d Cir.), cert. denied, 404 U.S. 854 (1971) (Executive Order 11246 not intended to punish misconduct). Since back pay is not a punitive sanction, its propriety can be justified, if at all, only as a remedial measure.

Executive Order 11246 has been upheld on the grounds that it helps to prevent government contractors from indirectly raising costs and delaying programs by discriminatorily excluding minorities from their labor pool. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir.), cert. denied, 404 U.S. 854 (1971). The executive's interest in enlarging the labor pool available to perform government contracts, thereby reducing costs and delay, is insufficient justification for the imposition of possibly devastating back pay liability upon a government contractor. See B. Schlei & P. Grossman, Employment Discrimination Law 749 (1976).[11] Such liability could severely disrupt a contractor's operations, thereby increasing costs and delay.

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[11] Accord Callahan, Defending Enforcement of Executive Order 11246 against Federal Construction Contractors: A Quagmire of Uncertainty, 30 Ad. L. Rev. 519, 531 (1978).

Private individuals have no cause of action under the Executive Order,[12] and if back pay is construed as a legitimate remedial measure these individuals would be given a remedy (back pay) they lack standing to claim.[13] A governmental cause of action should not be implied, because private individuals may recover back pay under Title VII of the Civil Rights Act of 1964.[14] The Executive

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12 E.g., Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964). See B. Schlei & P. Grossman, Employment Discrimination Law 202 (Supp. 1979); Comment, Executive Order 11246, Presidential Power to Regulate Employment Discrinination, 43 Mo. L. Rev. 451, 470-74 (1978). Lewis v. Western Airlines, Inc., 379 F. Supp. 684 (N.D. Cal. 1974), occasionally cited for the proposition that a private cause of action exists under the EXecutive Order, does not so hold.

13 Title VII of the Civil Rights Act of 1964 is distinguishable from the Executive Order on this point. Back pay can be recovered by the Government (the EEOC) for individuals, and individuals may sue in their own right to recover back pay. 42 U.S.C. § 2000e-5 (1976).

14 See note 13 supra.

Order does not give the Government a jus tertii action to assert rights of alleged discriminatees, for "all enumerated sanctions deal with punitive action to be taken against the contractor, rather than remedial action to be taken on behalf of third parties."[15]

In any event, such a remedy would be unconstitutional. The separation of powers principle will be meaningless if an executive edict devoid of statutory authorization may vest the Government with a cause of action against private individuals to benefit third parties in furtherance of the executive's objectives. Upholding such a presidentially-created cause of action would sanction flagrant legislating by the executive when that power rests solely with Congress.

Back pay is also impermissible because the regulations upon which OFCCP bases its authority to extract it are invalid. Regulations promulgated under Executive Order 11246 have no legal effect unless Congress has delegated some requisite

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15 Comment, supra note 12, at 494 n.223.

authority for them. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1719 (1979). The only possible legislative bases for OFCCP's regulations are Titles VI and VII of the Civil Rights Act of 1964,[16] the Equal Employment Opportunity Enforcement Act of 1972,[17] and the Federal Property and Administration Services Act of 1949.[18] For reasons indicated by petitioner,[19] the former two cannot justify the imposition of back pay liability, and presidential procurement power is deficient for the

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16 42 U.S.C. §§ 2000d to 2000d-4; 2000e to 2000e-17 (1976).

17 Pub. L. No. 92-261, 86 Stat. 103 (1972).

18 Pub. L. No. 81-152, 63 Stat. 377, as amended, 40 U.S.C. §§ 471-514 (1976).

19 Brief for Petitioner 11-17.

reasons stated at page 29, supra.[20] Judicial[21] and scholarly[22] authorities agree that back pay liability is unwarranted.

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20 In addition to these purported statutory bases for the Executive Order, it has been suggested that in exercising its procurement power the executive may impose contractual terms to further policy objectives. Such a basis for the Order is of dubious validity, since it would authorize the executive unilaterally to formulate and implement broad policy objectives upon which a congressional or national consensus may be lacking. Morgan, Achieving National Goals through Federal Contracts: Giving Form to an Unconstrained Administrative Process, 1974 Wis. L. Rev. 301, 304; Comment, supra note 12, at 481-82.

21 United States v. Lee Way Motor Freight, Inc., 15 F.E.P. 1385, 1398-99 (W.D. Okla. 1977). Cf. United States v. East Texas Motor Freight System, 564 F.2d 179, 184 (5th Cir. 1977) (retrospective seniority relief improper for violation of Executive Order 11246). The lone decision allowing back pay; United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976), has subsequently been specifically rejected; United States v. Lee Way Motor Freight, Inc., 15 F.E.P. 1385, 1398-99 (1977), and severely criticized. Comment, supra note 12, at 490-93.

22 Comment, supra note 12, at 487-95. See B. Schlei & P. Grossman, Employment Discrimination Law 349 (1976), 202 (Supp. 1979) (contractor forced to choose between paying back pay and possible loss of future contracts); Callahan, supra note 11, at 531 (suggesting back pay rests on dubious grounds).

OFCCP is clearly exceeding its authority by seeking to recover back pay from petitioner because: (1) back pay is not expressly authorized by § 209 of the Executive Order; (2) back pay cannot be implied as a legitimate punitive or remedial measure; and (3) the regulations upon which OFCCP bases its authority to recover it were promulgated without any delegation of legislative authority. For these reasons any contention that petitioner must exhaust administrative proceedings is incorrect.

B. OFCCP's Passover Practice Violated the Clear Command of § 208(b) of Executive Order 11246 that a Contractor May not Be Prohibited from Government Contracting Without an Opportunity for a Hearing.

Section 208(b) of Executive Order 11246 specifically requires that a contractor be given an opportunity for a hearing before a "debarment." Yet, OFCCP believes it may prohibit a "nonresponsible" contractor from receiving additional government contracts until alleged compliance

deficiencies are resolved, and OFCCP's regulations do not require a hearing on the determination of "responsibility." Thus, under OFCCP procedures a contractor may be punished before the question of whether it violated the Executive Order is resolved. The blameless are threatened with the same economic extortion as the culpable. OFCCP contends "passing over" a contractor during this interim before a hearing is not a "debarment."

Whether agency action is labeled a debarment is immaterial. Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1259 (D.C. Cir. 1975); Pan American World Airways, Inc. v. Marshall, 439 F. Supp. 487, 496 (S.D.N.Y. 1977). Effects must control in determining whether § 208(b) applies. Otherwise, supposedly temporary suspensions from government contracting may be employed as device to circumvent the procedural protections of a hearing,[23] or to economically coerce compliance with OFCCP's interpretation of the Executive Order. See Pan American World

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23 Morgan, supra note 20, at 336-37.

Airways, Inc. v. Marshall, 439 F. Supp. 487, 495 (S.D.N.Y. 1977).

The crucial question is whether a passover is the equivalent of a debarment under the provisions of § 208(b). The Seventh Circuit, in line with the overwhelming consensus of authority, has recently held that it is. Illinois Tool Works, Inc. v. Marshall, 48 U.S.L.W. 2075 (7th Cir. July 20, 1979), aff'g, 17 E.P.D. 6375 (N.D. Ill. 1978). As was correctly noted in Pan American World Airways, Inc. v. Marshall, 439 F. Supp. 487, 495 (S.D.N.Y. 1977):

> [T]he only difference between a "debarment" as functionally defined in the Order and a "passover" . . . is the number of government contracts affected. However, the Order does not authorize denial of . . . any number of contracts before a "debarment" is held to have occurred. To the contrary, the language "further contracts" of Section 209(a)(6) of the Order indicates that a "debarment" occurs when any contract is denied on the basis of noncompliance.

Accord Crown Zellerbach Corp. v. Marshall, No. 77-3036 (5th Cir. Nov. 17, 1977) (contractor may not be found "nonresponsible" without a hearing); Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337,

340-41 (D.D.C. 1968) (Sirica, J.); B. Schlei & P. Grossman, Employment Discrimination Law 201 n.26 (Supp. 1979) (nine cases cited therein). Scholarly opinion agrees with these decisions; a passover is the same as "summary debarment and, thus, contrary to administrative due process and the procedures established in [Executive Order 11246] regulations."[24]

Since a passover has the same effect as a debarment, OFCCP's practice of passing over a contractor once a show cause notice is issued clearly violates the unambiguous prohibition of § 208(b).[25] St. Regis is thus entitled to immediate judicial examination of the legality of OFCCP's actions.

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[24] Callahan, supra note 11, at 530.

[25] OFCCP's passover practice is also contrary to 42 U.S.C. § 2000e-17 (1976), which provides that an employer may not be denied a government contract pursuant to any equal opportunity order without a "full hearing and adjudication" in accordance with 5 U.S.C. § 554 (1976) if the employer's affirmative action plan was accepted by the Government within the past 12 months.

C. Petitioner Was Improperly Required to Exhaust Administrative Remedies Because OFCCP's Passover Practice Violates Due Process.

Exhaustion is also not required when an agency violates the Constitution, and the violation is clear. McCormick v. Hirsch, 460 F. Supp. 1337, 1344 (M.D. Pa. 1978). OFCCP's practice of passing over a contractor without a hearing is a deprivation of property without due process, and petitioner is therefore not obligated to exhaust the proceedings OFCCP now offers.

A contractural relationship with the Government creates property rights protected by the Due Process Clause of the Fifth Amendment. See Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571, 579 (1934). The extent of procedural due process afforded such a right is determined by weighing the recipient's interest in avoiding loss of that right and the governmental interest in swift adjudication. Goldberg v. Kelly, 397 U.S. 254, 263 (1970). See Goss v. Lopez, 419 U.S. 565, 579 (1975).

OFCCP's passover practice is accordingly constitutional only if its need for such a procedure outweighs the harm to a contractor from a threatened summary deprivation of its means of livelihood. Cf. Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (violation of due process for eligible welfare recipients to be denied benefits while dispute with welfare agency is processed).

The most analogous decision of this Court is Arnett v. Kennedy, 416 U.S. 134 (1974). Application of a traditional due process approach indicated a government employee was not entitled to a predischarge hearing when he was protected from an erroneous termination by the availability of welfare assistance and back pay and his continued retention before a hearing could cause significant problems for his employer. Id. at 164-71 (Powell, J., concurring).

Unlike the public employee in Arnett, a contractor is not protected while its case is being resolved. This is true because, although a contractor will not lose contracts before a hearing, it may be deprived of valuable subcontracts.

See 41 C.F.R. § 60-1.4(b)(7) (1978); Illinois Tool Works, Inc. v. Marshall, 48 U.S.L.W. 2075 (7th Cir. July 20, 1979).[26] Nor can a contractor recoup such losses. A post-debarment hearing would therefore be totally ineffective. A contervailing governmental necessity for debarring a contractor pending resolution of an alleged compliance deficiency is difficult to discern. See Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337, 340 (D.D.C. 1968) (Sirica, J.). Unlike the situation in Arnett, retention of a contractor pending a judicial hearing would not substantially hinder an agency's function or otherwise significantly impair governmental interests. The marginal increment in costs and delay that would arguably accompany such a judicial hearing pale into comparative insubstantiality when balanced against the harm to a contractor from a debarment.

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26 For a description of other adverse consequences that may arise from a suspension from government contracting, see Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) (Burger, J.).

Lastly, OFCCP's passover practice violates the principle that if the recipient of a government benefit has a substantial interest in retaining it, that benefit may not be summarily withdrawn, even temporarily, without affording the recipient some minimal pre-deprivation hearing if post-deprivation relief would be inadequate. Goss v. Lopez, 419 U.S. 565 (1975) (pupil suspended from school for ten days entitled to pre-suspension hearing unless pupil is a continuing threat to persons or property). See Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978). Due process requires a hearing before an individual is deprived of any significant property interest, and this requirement is inapplicable only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis added) (footnotes omitted).

As no extraordinary circumstances exist to justify a contractor's summary debarment, OFCCP's

passover practice clearly violates the Due Process Clause and petitioner is therefore entitled to immediate judicial relief.

CONCLUSION

Although the exhaustion doctrine as it stands entitles petitioner to immediate judicial relief, we must acknowledge that this area of the law is less than clear. Professor Davis notes that exhaustion "is about as unprincipled as any subject on which judicial opinions are written can be." K. Davis, Administrative Law Treatise § 20.07, at 466 (Supp. 1976).[27] Only two significant exhaustion decisions have been rendered by this Court, the last eight years ago. They cover only a meager fraction of the doctrine.[28] This area of the law

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27 Accord Montgomery v. Rumsfeld, 572 F.2d 250, 252 (9th Cir. 1978); G. Robinson & E. Gellhorn, The Administrative Process 217 (1974).

28 See K. Davis, Administrative Law Treatise § 20.07, at 466 (Supp. 1976). According to Professor Davis the cases are McGee v. United States, 402 U.S. 479 (1971); and McKart v. United States, 395 U.S. 185 (1969).

cries out for Supreme Court leadersip and clarification, and this Court can go far toward achieving that goal by holding that the lower courts erred in requiring exhaustion because: (1) exhaustion permits OFCCP to subject government contractors to economic coercion which frustrates effective challenges to its regulations; (2) petitioner challenged OFCCP's regulations as being in excess of authority, a matter beyond OFCCP's proper sphere of expertise; (3) OFCCP refused to consider legal challenges to its regulations; (4) the threatened harm petitioner faces if denied judicial relief outweighs any governmental interest in requiring exhaustion; (5) OFCCP is clearly exceeding its authority by seeking to recover back pay; and (6) OFCCP's passover practice violates due process and the unambiguous prohibition of § 208(b) of Executive Order 11246 that a contractor may not be debarred without an opportunity for a hearing.

While exhaustion is vitally significant in the present case it is, in a sense, only a superficial overlay under which simmer momentous societal concerns -- i.e., the permissible remedies for

violations of the laudable nondiscrimination objectives of the Executive Order. Until the exhaustion barrier is removed, OFCCP's regulations, recently recognized by this Court to be of questionable validity; Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1719-20 (1979); will remain immune from effective challenge. So long as that is true, these profound questions will continue to be the preeminent issue in equal employment law. The petition for certiorari should be granted.

Respectfully submitted,

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KRUG, TAUSEND &
BEEZER

Amicus Curiae

August 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1642

ST. REGIS PAPER COMPANY, A Corporation
Petitioner

v.

RAY MARSHALL, Secretary of Labor, *et al.*
Respondents

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioner respectfully prays, pursuant to Rule 58.2., for Rehearing of the Order of the Court entered October 1, 1979, denying Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE PETITION

1. The Doctrine of Exhaustion of Administrative Remedies Should Not be Applied Where an Administrative Agency is Attempting to Impose Requirements in Conflict with a Federal Statute.

2. An Administrative Agency Should Not Be Permitted to Use the Doctrine of Exhaustion of Administrative Remedies as a Tool for Extorting Unauthorized Remedies.

3. No Person Should Be Required to Exhaust Administrative Remedies Where it is Clear and Apparent that the Administrative Tribunal Has Already Taken a Fixed Public Position on the Issues Involved and Is Incapable of Making an Impartial Decision.

I.

The Doctrine of Exhaustion of Administrative Remedies Should Not Be Applied Where An Administrative Agency Is Attempting To Impose Requirements In Conflict With a Federal Statute

The presently pending administrative proceedings resulted from a Show Cause Notice dated May 14, 1976 (Appendix F, p. 40a, Petition for Writ of Certiorari) requiring Petitioner to provide "make whole" remedies which

> should include, but will not be limited to, employment and retroactive awards of pay and service credits

to an alleged affected class of female applicants and incumbents, because of an alleged "underutilization" of females. The imposition of such remedies by the Office of Federal Contract Compliance Programs ("OFCCP") violates standards of proscribed conduct

under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2. It violates such standards because the requirement to hire more females and grant them retroactive pay awards or service credits (retroactive seniority) will necessarily infringe on the job and priority appointments of non-members of the "affected class". These standards are:

> 1. Failing or refusing to hire any individual, or discriminating against any individual, with respect to his compensation, terms, conditions or privileges of employment, because he is of the male gender [Sec. 703.(a)(1), 42 U.S.C. § 2000e-2(a)(1)];
>
> 2. Limiting, segregating or classifying employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because he is of the male gender [Sec. 703.(a)(2), 42 U.S.C. § 2000e-2(a)(2)];
>
> 3. Acting in derogation of the terms of a bona fide seniority or merit system by giving preference due to gender [Sec. 703.(h), 42 U.S.C. § 2000e-2(h)]; and
>
> 4. Requiring an employer to grant preferential treatment to a female because of her sex on account of an imbalance which may exist with respect to the total number or percentage of . . . [females] employed by any employer . . . in comparison with the total number or percentage of . . . [females] in any community, State, section, or other area, or in the available work force in any community, State, section or other area [Sec. 703.(j), 42 U.S.C. § 2000e-2(j)].

The majority opinion in the Court's recent decision in *United Steelworkers of America* v. *Weber*, ——

U.S. ——, 99 S.Ct. 2721 (1979), would, it may be assumed, permit private *voluntary* sex-conscious affirmative action which adversely affects other classes of employees [99 S.Ct. at 2728-30]. However, the majority of the Court made it clear that it would not *require* such action because of a *de facto* imbalance in the employer's workforce [99 S.Ct. at 2729].

Justice Rehnquist noted in his dissenting opinion that Kaiser and the Steelworkers acted under pressure from an OFCC charge of underutilization of minorities [99 S.Ct. at 2749]. In this case, OFCCP threatened Petitioner with debarment from government contracts which would be very costly to Petitioner. This was done to force or require Petitioner to enter into a "Conciliation" agreement providing for hiring more females and to impose retroactive pay awards and seniority rights for these and other females. This is the antithesis of "voluntary" action. This is precisely the type of pressure that Section 703.(j), and implicitly Sections 703.(a) and (d) of Title VII, were intended to prevent.

In *International Brotherhood of Teamsters* v. *United States*, —— U.S. ——, 97 S.Ct. 1843 (1977), the Court dealt with Section 703.(h), noting that its

> unmistakable purpose . . . was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII [97 S.Ct. at 1863].

Title VII was not intended to "destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act [97 S.Ct. at 1863]".

Title VII cannot be used, therefore, to "place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority [*Id.*]".

Again, sex cannot be used as a basis for preference except presumably on a wholly voluntary basis.

It is clear that the OFCCP is attempting to impose on Petitioner, as exemplified by its show cause notice of May 14, 1976, remedies in the nature of affirmative action granting a preference to females solely because they are females, and in derogation of a bona fide seniority system. Reading *Weber* and *Teamsters* together, a federal agency lacks statutory authority to *impose* such remedies.

Under such circumstances, Petitioner should not be required to exhaust its administrative remedies inasmuch as requiring it to do so would only serve to support a statutory violation by OFCCP.

II.

An Administrative Agency Should Not Be Permitted to Use the Doctrine of Exhaustion of Administrative Remedies as a Tool for Extorting Unauthorized Remedies

The remedies sought by the OFCCP from Petitioner are neither authorized by the Executive Order, nor permitted by Title VII. Disregarding this, the Department of Labor, through its Office of Federal Contract Compliance Programs, has used the threat of loss of Government contracts to extort such unauthorized and unlawful remedies from Petitioner and thousands of other Government contractors. Government contractors

are told it is a cost of doing business, and in fact, a condition for continuing to do business, with the Federal Government. The Government knows full well that many contractors cannot afford the cost of the protracted discovery and even more protracted "trials" before the administrative tribunals to which the contractor will be subjected if it fails to yield to OFCCP's demands.

The Government persists in ignoring rules of reasonable discovery limitations in these cases, often forcing contractors to provide it with documents by the thousands and hundreds of thousands, the bulk of which have no relevance in time or subject matter to the deficiencies allegedly existing in the contractor's AAP. It must be evident to the Court from the number of suits pending in the Federal courts stemming from OFCCP's unfettered methods of pursuing alleged "non-complying" contractors that something is wrong with the system. Unfortunately, there are many more contractors who bend to OFCCP's threats and provide these unauthorized and unlawful remedies under the guise of "Conciliation Agreements". The pressure that OFCCP can bring to bear on contractors is so great as to inhibit most contractors from risking debarment and other sanctions in order to attempt to assert legal and due process rights in the Courts. The only course now available to a contractor is to go through a long, burdensome, and costly administrative proceeding whose outcome is foreordained. The result is foreordained because the Agency, by regulation, has provided for these unlawful remedies and is certainly not going to rule contrary to its own published policies. Petitioner, and other Government contractors, should

not be required to pursue meaningless, expensive, and almost interminable administrative proceedings before having their day in court.

III.

No Person Should Be Required to Exhaust Administrative Remedies Where It Is Clear and Apparent That the Administrative Tribunal Has Already Taken a Fixed Public Position On the Issues Involved and Is Incapable Of Making An Impartial Decision

The Administrative Hearing is presided over by an Administrative Law Judge employed by the Department of Labor. These judges consider themselves bound by the regulations of the Department of Labor, and as pointed out in the Petition for Writ of Certiorari, they refuse to deal with the issue of the legality of the regulations which are presumably implementing the Executive Order.

There is no likelihood in the administrative proceeding for a ruling favoring a contractor and certainly not on policy matters covered by existing regulations such as is the case here.

The record of the administrative proceedings in this case, as well as the record of administrative proceedings in cases involving other contractors, make it apparent that an impartial tribunal is not provided and due process is not observed. Under such prejudicial circumstances, Petitioner and other Government contractors clearly should not be required to submit themselves to such a costly and prolonged proceeding as a condition precedent to obtaining a ruling on these important legal issues in the Federal courts.

CONCLUSION

For the reasons stated, we ask that the petition be reconsidered by the Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Guy Farmer, counsel of record for St. Regis Paper Company, does hereby certify that the Petition for Rehearing to which this certificate is attached is presented in good faith and not for delay. I further certify that said Petition is restricted to a discussion of substantial grounds available to Petitioner which were not previously presented in its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

GUY FARMER